

No. 10597

United States
Circuit Court of Appeals
For the Ninth Circuit.

FRED J. ROGERS, MIRON RUSTIGIAN and
HAGOOHI RUSTIGIAN,

Appellants,

vs.

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION, a Corporation,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Northern Division

FILED

NOV 29 1943

PAUL P. O'BRIEN,
CLERK

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Ann. N. Y. Acad. Sci. 1957, 10: 1-10
New York

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

MATT GOLDSTEIN

Brix Building

Fresno, Calif.

For Appellee:

EDMUND NELSON and

DANIEL I. SCHNABEL

650 S. Spring St.

Los Angeles 14, Calif. [1*]

In the District Court of the United States, for the
Southern District of California, Northern
Division

No.....

In the Matter of

MIRON RUSTIGIAN and HAGOOHI RUS-
TIGIAN,

Debtor

DEBTORS' PETITION IN PROCEEDINGS
UNDER SECTION 75 OF THE BANK-
RUPTCY ACT

To the Honorable Wm. P. James, Judge of the
United States District Court for the Southern
District of California:

The petition of Miron Rustigian and Hagoochi
Rustigian, of Fresno, California, whose addresses
are 2535 McKenzie Avenue, Fresno, California, oc-
cupation farmers, Respectfully Represents:

That they are personally bonafide engaged pri-
marily in farming operations (or that the principal
part of their income is derived from farming op-
erations) as follows:

They have approximately one hundred (100)
acres of land devoted principally to the growing of
grape vines, located in the County of Madera, State
of California; that petitioners herein own said
interest in said real property as community prop-
erty; that petitioners are husband and wife; that
each and all of the assets and liabilities referred to
herein are of a community nature and that there is

no separate property or liability involved in the within proceedings; that such farming operations occur in the County of Madera within said judicial district; that they are insolvent (or unable to meet their debts as they mature); and that they desire to effect a composition or extension of the time to pay their debts under section 75 of the Bankruptcy Act.

That the Schedule hereto annexed marked "A" and verified by your petitioners' oath, contains a full and true statement of all their debts, and (so far as it is possible to ascertain) the names and places of residence of their creditors, and such further statements concerning said debts as are required by the provisions of said act.

That the Schedule hereto annexed marked "B" and verified by your petitioners' oath, contains an accurate inventory of all their property, both real and personal, and such further statements concerning said property as are required by the provisions of said act.

Wherefore, your petitioners pray that their petition may be approved by the Court and proceedings had in accordance with the provisions of said Section.

MIRON RUSTIGIAN
HAGOOHI RUSTIGIAN

FRED J. ROGERS

Attorney for Petitioners
813-14-15 Pacific Southwest Bldg.,
Fresno, California.

United States of America,
Southern District of California,—ss.

We, Miron Rustigian and Hagoohi Rustigian, the petitioning debtors mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of our knowledge, information and belief.

MIRON RUSTIGIAN
HAGOOHI RUSTIGIAN

Subscribed and sworn to before me this 6th day of May, 1940.

FRED J. ROGERS
Notary Public in and for the County of Fresno,
State of California.

[Endorsed]: Filed May 18, 1940. [2]

[Title of District Court and Cause.]

No. 5465 Bkey.

APPROVAL OF DEBTOR'S PETITION

and Order of Reference

(under Section 75 Bankruptcy Act)

At Los Angeles, in said District, on May 18, 1940, before the said Court the petition of Miron Rustigian and Hagoohi Rustigian, husband and wife, that they desire to effect a composition or an extension of time to pay their debts, and such other

relief as may be allowed under the Act of March 3, 1933, and within the true intent and meaning of all the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said petition is hereby approved accordingly.

It is thereupon ordered that said matter be referred to John D. Boyle, Esq., one of the Conciliation Commissioners in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said Miron Rustigian and Hagoohi Rustigian, husband and wife, shall attend before said Conciliation Commissioner on May 25, 1940, and at such time as said Conciliation Commissioner shall designate, at his office in Madera California, and shall submit to such orders as may be made by said Conciliation Commissioner or by this Court relating to said matter.

Witness, the Honorable Wm. P. James Judge of said Court, and the seal thereof, at Los Angeles, in said District, on May 18, 1940.

[Seal] R. S. ZIMMERMAN, Clerk

By F. BETZ

Deputy Clerk

[Endorsed]: Filed May 18, 1940. [4]

[Title of District Court and Cause.]

DEBTORS' AMENDED PETITION IN PROCEEDINGS UNDER SECTION 75 OF THE UNITED STATES BANKRUPTCY ACT AS AMENDED

To the Honorable Judges of the District Court of the United States, in and for the Southern District of California:

The amended petition of Miron Rustigian and Hagoochi Rustigian, of the County of Fresno, State and Southern District of California, respectfully shows:

That prior hereto the within debtors filed a petition in the above entitled Court under the provisions of Section 75 of the United States Bankruptcy Act as amended, praying for a composition or extension of time in which to pay their debts. That thereafter by an Order duly made by the above entitled Court, the matter was referred to John D. Boyle, Esq., the duly appointed, qualified and acting Conciliation Commissioner; that said Conciliation Commissioner after due proceedings had, held a meeting of debtors' creditors; that at said meeting they tendered an offer of composition and said creditors refused to accept the same and none of their creditors would accept a proposal or offer of composition or extension.

That your petitioners are entitled to be adjudicated bankrupts in accordance with the provisions of said Section 75 of the United States Bankruptcy Act as amended, and petitioners do hereby petition

and request that all of their property, wherever located, whether pledged, encumbered or unencumbered, be appraised, and that their unencumbered exemptions and unencumbered interest or equity in their exemptions as prescribed by State Law be set [5] aside to them, and that they be allowed to retain possession, under the supervision and control of the Court, of all of the remainder of their property including encumbered exemptions.

Wherefore, your petitioners pray that they may be adjudicated bankrupts in accordance with the provisions of said Section 75 of the United States Bankruptcy Act as amended, and that they be granted, extended and given all of the benefits, privileges, rights, and immunities provided for in said Section 75 of the United States Bankruptcy Act as amended, and as particularly provided for in Subsection "S" thereof and for such other and further relief as may be meet.

MIRON RUSTIGIAN
HAGOOHI RUSTIGIAN
Petitioners.

Southern District of California
County of Fresno—ss.

Miron Rustigian and Hagoohi Rustigian, each for himself, and not one for the other, being first duly sworn, both depose and say:

That he is one of the petitioners named in the foregoing petition; that he has read the same and knows the contents thereof; that the same is true

of his own knowledge except as to matters therein stated on information or belief, and as to those matters that he believes it to be true.

MIRON RUSTIGIAN

HAGOOHI RUSTIGIAN

Subscribed and sworn to before me this 20th day of August, 1940

[Seal]

FRED J. ROGERS

Notary Public in and for said County and State.

[6]

[Title of District Court and Cause.]

ADJUDICATION, ORDER OF REFERENCE,
AND TEMPORARY RESTRAINING ORDER

Under Section 75-s, Bankruptcy Act.

At Los Angeles, in said District, on August 23, 1940, before said Court in Bankruptcy, the Petition of Miron Rustigian and Hagoochi Rustigian, husband and wife, debtors in the above-entitled matter, that they be adjudged bankrupt under the terms and provisions of Section 75-s of the Bankruptcy Act, and within the true intent and meaning of the Acts of Congress relating to Bankruptcy, having been heard and duly considered, the said Miron Rustigian and Hagoochi Rustigian, husband and wife, are hereby declared and adjudged bankrupt accordingly.

It is thereupon ordered that said matter be referred to John D. Boyle, the Conciliation Commissioner for Madera County, to act as Referee in

Bankruptcy of this Court and to take such further proceedings therein as are required by said Acts; and that the said Miron Rustigian and Hagoochi Rustigian, husband and wife, shall attend before said Conciliation Commissioner, acting as Referee, at his office in Madera, California, on Aug. 30, 1940, at 10:00 o'clock a. m. and shall submit to such orders as may be made by said Conciliation Commissioner, acting as such Referee or by this Court relating to said matter in Bankruptcy.

And it is further ordered, adjudged and decreed that all creditors of the above-named bankrupts be and they are hereby enjoined and restrained from commencing or maintaining any judicial or official proceedings in any Court, or under the direction of any official against the said bankrupts or any of their property, and from proceeding with any sale of the Bankrupt's property under the terms of any Deed of Trust, until further order of this Court.

Witness, the Honorable Harry A. Hollzer, Judge of said Court, and the seal thereof, at Los Angeles, in said District, on August 23, 1940.

[Seal] R. S. ZIMMERMAN, Clerk,
By G. S. WHITE
Deputy Clerk

[Endorsed]: Filed Aug. 23, 1940. [7]

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON REVIEW

I, Herbert McDowell, United States Conciliation Commissioner at Fresno, California, respectfully certify and submit as certificate on review, the following:

1. That the above entitled matter was referred to John D. Boyle, Conciliation Commissioner of Madera, to act as Referee in Bankruptcy under Section 75S of the Bankruptcy Act, on August 23rd, 1940; that thereafter and on January 26th, 1942, by reason of the resignation of John David Boyle and by order of Paul J. McCormick, United States District Judge, the above entitled matter was referred to me as Conciliation Commissioner, and the said matter is now pending before me as Conciliation Commissioner.

2. That during the course of said proceedings and on the 29th day of June, 1942, Fred J. Rogers, attorney for the debtors, filed a petition verified by Hagoohi Rustigian, one of the debtors, on June 24, 1942, wherein the debtors prayed for the payment of the sum of \$1500.00 on account of counsel fees. From said petition it appeared that an action had been filed by one E. D. Campbell as plaintiff against Miron Rustigian and Hagoohi Rustigian, the debtors, and one Harry Rustigian as defendants in the Superior Court of the State of California for the County of Madera. In that action, the said E. D. Campbell sought a judgment declaring that he was the owner of the real property

which constitutes the sole asset of this estate, and further [8] adjudging that the debtors above named had no right, title or interest in said property. The plaintiff E. D. Campbell also sought possession of said property in said action. In order to defend said action it was necessary that counsel be retained and, for this purpose, the said Fred J. Rogers retained as associate counsel Frank Curran and David E. Peckinpah, both of whom are attorneys having their offices in Fresno, California. In that action, the jury brought in a verdict in favor of the defendants but thereafter the trial court granted a new trial and the action has not yet been disposed of.

In the petition of Miron Rustigian and Hagoohi Rustigian they asked for the payment of \$1500.00 to Fred J. Rogers, Frank Curran and David E. Peckinpah as a payment on account of services rendered in defending the action in the Superior Court, Madera County, hereinbefore referred to.

3. That said petition was duly noticed for hearing before me on the 29th day of July, 1942, said notice having been given to each of the creditors named in the schedules filed by the said debtors at the places of residence or address, as the same was designated in said petition, or as subsequently filed by the creditors with the referee.

4. That in opposition to the petition of the said Fred J. Rogers there were filed the following:

A. Objections of Security National Bank of Los Angeles, a secured creditor.

B. Objections of Bank of America N. T. & S. A.

5. That thereafter and on the 14th day of August, 1942, the said matter was heard before the undersigned, the debtors being present in person and being represented by Fred J. Rogers, their attorney; the objectant, Security First National Bank of Los Angeles, being represented by Claude L. Rowe, Esq., its attorney; the objectant, Bank of America N. T. & S. A. being represented [9] by Daniel I. Schnabel, Lawrence W. Young, and William B. Backlund, its attorneys.

6. That during the course of said hearing, oral evidence was adduced, the following witnesses having been sworn and having testified: Matt Goldstein, David E. Peckinpah and Fred J. Rogers. A transcript of the testimony of said witnesses is hereto annexed and made a part hereof.

7. That thereafter and on November 25th, 1942, a written order was made by the undersigned as Conciliation Commissioner, granting said petition to the extent of allowing and awarding to Fred J. Rogers, attorney for the petitioner, the sum of \$1500.00 to be paid on account of attorneys' fees for services rendered in defending said action.

8. That, through inadvertence, the undersigned, as Conciliation Commissioner, failed to make findings of fact and conclusions of law, and to this extent the said order is defective and the matter should, in the opinion of the undersigned Conciliation Commissioner, be referred back to the undersigned for the purpose of making findings of fact and conclusions of law.

9. That the Bank of America N. T. & S. A., by its attorneys Edmund Nelson and Daniel I. Schnabel, Esqs., has filed its petition to review said order made by the undersigned on November 25, 1942, which petition to review is transmitted herewith.

10. That by the same petition the said Bank of America N. T. S. A. also seeks to review a former and prior order made by the undersigned on February 25, 1942, by the terms of which order the undersigned awarded to the said Fred J. Rogers the sum of \$750.00 on account of counsel fees for services theretofore rendered by the said Fred J. Rogers as attorney for the debtors in the above entitled proceeding.

11. That said attorneys' fees awarded to the said Fred J. Rogers by order made on February 25, 1942, were awarded by [10] reason of a petition filed by the said Fred J. Rogers, duly verified by him on February 5, 1942, and filed with the undersigned on February 7, 1942, and after a hearing before me on February 25, 1942, in which evidence was offered in support of the allegations of said petition.

12. That there is transmitted herewith the following papers:

(1) Petition verified by Fred J. Rogers on February 5, 1942, and filed with the undersigned on February 7, 1942.

(2) Order made by the undersigned on February 25, 1942.

(3) Petition of Miron Rustigian and Hagoohi

Rustigian, verified by Hagoohi Rustigian on June 24, 1942.

(4) Objections filed by Security First National Bank of Los Angeles, dated July 16, 1942.

(5) Objections filed by Bank of America N. T. & S. A., verified July 30, 1942.

(6) Testimony of Matt Goldstein, David E. Peckinpah and Fred J. Rogers given before me on July 29, 1942.

(7) Affidavit of mailing dated July 6, 1942.

(8) Order made by the undersigned dated November 25, 1942.

(9) Petition to review filed by Bank of America N. T. & S. A. December 3, 1942.

Dated: Fresno, California, this 10th day of April, 1943.

HERBERT McDOWELL

Referee

[Endorsed]: Filed April 12, 1943. Herbert McDowell, Referee. Helene McDowell, Clerk. [11]

[Title of District Court and Cause.]

PETITION FOR ORDER PERMITTING THE
PAYMENT OF MONEYS FOR ATTOR-
NEYS' FEES

To the Hon. Herbert McDowell, Referee:

Come now the above named debtors, Miron Rustigian and Hagoohi Rustigian, and respectfully represent:

That there is involved in the within proceedings the following described real property lying and being in the County of Madera, State of California, to-wit:

The south half of the northeast quarter of the southeast quarter, and the south half of the southeast quarter, of Section 33, Township 12 South, Range 17 East, Mount Diablo Base and Meridian.

That on the 27th day of November, 1941, there was brought in the Superior Court of the State of California, in and for the County of Madera, that certain suit entitled: E. B. Campbell, Plaintiff, vs. Harry Rustigian, Miron Rustgian and Hagoohi Rustigian (also known as Haigouhi Rustigian), husband and wife, John Doe, Jane Doe, and Doe Company, a corporation, Defendants, No. 6014, and the object and purpose of said suit being an attempt on the part of the plaintiff to divest these debtors of their entire ownership and interest in and to said real property, and all crops now growing thereon.

That said suit represented and was the culmination of efforts on behalf of the plaintiff and his assignor, the Bank of America National Trust and Savings Association to divest these debtors of all their right and ownership in and to said real property and the crops now growing thereon, and the said trial came on regularly for hearing before said Superior Court on the 27th day of May, 1942, before a jury, and the trial was not completed until the 29th [12] day of May, 1942, at which time the jury

brought in and rendered a verdict in favor of these debtors;

That for over a year prior to the filing of said Superior Court suit the said plaintiff, his said assignor, and the Security First National Bank of Los Angeles, had joined in a concerted and well mapped program whereby these debtors would be deprived of their property, and the efforts of said institutions and their satellites continued up to the termination of said trial and still continues, whereby the said institutions have exerted every conceivable effort to accomplish their desires as above indicated; that a motion for a new trial made on behalf of the plaintiff is now pending before said Superior Court.

That it was necessary and desirable for these debtors to obtain adequate counsel to carry on and maintain the defense to the efforts of said institutions and in this connection these debtors did, approximately two months before the trial of said cause, retain Frank Curran, an attorney at law, and their regular attorney herein, Fred J. Rogers, has worked continuously in connection with said litigation; that approximately two weeks before the said trial these debtors retained and engaged David Peckinpah to also assist in carrying on the defense to said suit; that for a period of approximately ten days prior to said trial at least two of said counsel devoted practically all of their time and attention to the preparation of the defense to said litigation, and all three of said counsel devoted all of their

time and attention to the trial of said case during the three days devoted to such trial;

That the within debtors desire at this time to pay unto the said three counsel the sum of \$1500.00, in connection with the services they have heretofore rendered in connection with said litigation, and that the within Court make and enter its order granting and permitting the within debtors to immediately proceed [13] to pay said sum unto said three attorneys; that the payment of said sum at this time is a reasonable amount to be so paid, and had it not been for the efficient and continuous services rendered by said attorneys in connection with said litigation the within debtors would have, in all probability, been deprived of their ownership in and to said property and thereby have been deprived of property of the reasonable value of not less than \$20,000.00.

Wherefore, the within debtors pray that the within Court make and enter its order permitting them to immediately pay unto Frank Curran, David Peckinpah and Fred J. Rogers the sum of \$1500.00, and for such other and further orders as may be meet.

FRED J. ROGERS

Attorney for Debtors

State of California,
County of Fresno—ss.

Hagoohi Rustigian, being first duly sworn, deposes and says:

That she is one of the debtors above named; that

she has read the foregoing Petition for Order Permitting the Payment of Moneys for attorneys' fees, and knows the contents thereof; that the same is true of her own knowledge, except as to matters therein stated on information and belief and as to those matters that she believes it to be true.

HAGOOHI RUSTIGIAN

Subscribed and sworn to before me this 24th day of June, 1942.

FRED J. ROGERS

Notary Public in and for said County and State.

[Endorsed]: Filed June 29, 1942. Herbert McDowell, Referee. Helene McDowell, Clerk. [14]

[Title of District Court and Cause.]

OBJECTIONS OF SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, SECURED CREDITOR, TO PETITION FOR ORDER PERMITTING THE PAYMENT OF MONIES FOR ATTORNEYS' FEES

To the Honorable, the above entitled District Court of the United States, and to Herbert McDowell, Esq., the Conciliation Commissioner—Referee, to whom the above entitled matter has been referred:

This, the Objections of the Security-First National Bank of Los Angeles, a National Banking Association, organized and existing under and by virtue of the laws of the United States of America,

with its principal place of business in the City of Los Angeles, County of Los Angeles, State of California, respectfully represents and shows:

I.

That this Objector is a secured creditor of the above named Bankrupts and that, pursuant to notice duly given, Objector did, on or about the 11th day of June, 1940, file with former Conciliation Commissioner, John David Boyle, predecessor of the Conciliation Commissioner herein, its verified proof of its secured claim against said Bankrupts, setting forth

Unpaid principal balance	\$15,187.50
Interest thereon at 6% per annum from December 31, 1938	

II.

That the amount of said claim at this time is as follows:

Unpaid principal balance	\$15,187.50
	[15]

Advances made by Beneficiary under
terms of Deed of Trust \$295.42
Interest is paid to February 16, 1940,
ONLY.

III.

That, on or about February 25, 1942, Conciliation Commissioner Herbert McDowell, acting as Referee, entered an Order directing the payment of \$750.00 to Fred J. Rogers, Attorney for the Bankrupts, from funds of said Bankrupts' estate, on account of counsel fees for services theretofore and there-

after to be rendered in connection with the action instituted by E. B. Campbell against said Bankrupts and others on or about November 27, 1941.

IV.

That, on or about June 29, 1942, the above named Bankrupts filed in this Court, a "Petition for order permitting the payment of monies for attorneys' fees" praying for an Order to pay from this Bankrupt estate the sum of \$1,500.00 to Fred J. Rogers, Attorney of record for the above named Bankrupts, and to Frank Curran, Attorney at Law, and David Peckinpah, an Attorney at Law, in addition to the fee of \$750.00 already paid to Fred J. Rogers less than five months' ago for services arising from the same aforementioned action.

V.

That neither of the latter two named attorneys, Frank Curran or David Peckinpah, were employed or engaged by said Bankrupt estate and at the expense of said bankrupt estate upon Order of the Court or Referee first obtained, as required by the Rules of Practice and Procedure in the District Court of the United States.

VI.

That neither assets nor property were brought into this Bankrupt Estate through the efforts of said three Attorneys for the services performed by them and that the \$750.00 hertofore paid to Fred J. Rogers, Attorney, from this Bankrupt Estate, is a fair and adequate fee for services in defense of the

aforesaid Quiet Title Action involving property
appraised at \$ [16]

VII.

It is the contention of this Objector that the Conciliation Commissioner in this matter should deny the "Petition for Order Permitting the Payment of Monies for Attorneys' Fees" for the following reasons:

Section 64—National Bankruptcy Act—(a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of Bankrupt estates, and the order of payment, shall be (1) the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition;—and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed—to the Bankrupt in voluntary and involuntary cases, as the Court may allow—.

Said Section 64 defines the rule for paying out the money arising from the Bankrupts' property which remains for general distribution after all special liens and encumbrances have been dealt with.

In re: Brannon 62F. (2) 959

The words used by the legislature cannot be extended by the Courts to cover cases not comprehended by the statute, merely because the case in hand may be thought equally meritorious with those that are given a special value.

In re: Estey 6F Supp. 570

S. Bell Tel. vs. Caldwell 67F. (2) 802

Section 64a (1) gives priority to actual and necessary costs of preserving the Bankrupt estate and to the cost of administration, including one reasonable attorney's fee for the Bankrupt in a limited class of cases.

In re: Realty Associates Sec. Corp. 69F. (2)

41

Dunn vs. Interstate Bond Co. 68F (2) 364

Evenod Perfumer Inc. 67F. (2) 878

The authorities, while sanctioning fees for preparing the petition and the schedules, for securing the adjudication, and for attending the creditors' meeting and the examination of the Bankrupts, refuse compensation (unless through the effort of the Bankrupts' attorney assets are brought into the estate) for any other services except such as were rendered before a [17] trustee was appointed and which are beneficial to the estate. The allowance to the Bankrupts' attorney is limited strictly to the few acts required to be done by him before a trustee is appointed. After that, the Bankrupts' attorney may not receive compensation unless he has performed services which have resulted in bringing assets or property into the estate.

In re: Cheney 300F. 465

In determining the amount of the allowance, the need for economy in administration must be kept in mind at all times.

In re: Curtis 100F. 784

In Re: Barceloux 74F. (2) 288

Callaghan vs. R. F. C., 297 U. S. 464

In re: Rothman 14F. Supp. 241

In re: Owl Drug Co. 16F. Supp. 139

Cohn vs. Edler 90F. (2) 823

The Bankrupts' attorney is entitled only to compensation out of the estate for services which, though performed for Bankrupts, are in reality an aid to the estate in its administration. The Bankruptcy Act does not contemplate that the estate shall be burdened with the expense of furnishing an attorney for the Bankrupts every time they appear before the Referee, and further, the attorney's compensation is limited to services rendered to the Bankrupts while performing the duties devolving on him under the Act. It does not include services rendered prior to the institution of the bankruptcy proceedings. The duties for which the attorney may receive compensation are those imposed by the Act and no others. These duties are set forth in Section 7 of the Bankruptcy Act.

In re: Herald-Post Inc. 21F. Supp. 231

In re: Krispy Baking Co. (American Bankruptcy Review, February, 1938, 219)

It is well settled that, where a secured creditor is required to come into a Court of Bankruptcy to protect his lien on specific property, he should not ordinarily be charged with any part of the costs of the general administration of the estate. [18]

Mills vs. Va. Co. Lumber Co. 164 Fed. 168

Byrer vs. Bushong 42 A. B. R. 14

There can be no allowance for the Bankrupts' attorney's fees not connected with the direct preservation of the property

In re: Goldville Mfg. Co. 10 A. B. R. 552

In re: Freeman 190F 48

In re: Frick 1 A. B. R. 719

In re: Prince and Walter 131F 546

Remington on Bankruptcy, Volume 6, Section 2674 "For many of the services ordinarily performed, the attorney must seek his pay from his own client rather than from the Bankrupt's estate".

Remington on Bankruptcy, Volume 6, Section 2674.50 "There seems to be no objection to the Court's ad interim allowances from time to time on account of attorney's fees of the receiver or the trustee; but allowances to the Bankrupt for the services of their attorneys, depend on statute, section 64 (b) of the Act; 11 U. S. C. A. Section 104, and are regulated thereby; and the conditions that only one fee shall be allowed and that for services actually rendered would seem to preclude ad interim allowances to such attorneys".

Section 75 (b) "—no fees, costs or other charges shall be charged or taxes to any farmer or to his creditors by any Conciliation Commissioner or with respect to any proceedings under this section, except as hereinbefore in this section provided—".

Rancho San Carlos Inc. vs. Greene 93F 338
9th Cir. Calif.

Where a secured creditor is required to go into a Court of Bankruptcy to protect his lien on specific property, he should not ordinarily be charged with any part of the costs of the general administration of the estate. In this case, appellant, attorney for the Bankrupt in a Section 75 (s) [19] proceedings, contended that a reasonable attorney's fee for the attorney for the Bankrupts is properly taxable as a part of the costs under Bankruptcy Act, Section 64, sub. (a) (1), are payable out of the general assets of the estate, and that there is nothing in Section 75 subjecting property of mortgagees to their payment.

Byrer vs. Bushong 42 A. B. R. 14

By reason of the foregoing principles of law and fact, it is respectfully submitted that the "Petition for Order Permitting the Payment of Monies for Attorneys' Fees" should be denied.

Dated this 16 day of July, 1942.

CLAUDE L. ROWE

Attorney for Security-First
National Bank of Los Angeles

[20]

Due Receipt of the annexed objections admitted this 16th day of July, 1942.

FRED J. ROGERS,

Attorney for Bankrupts.

[Endorsed]: Filed July 16, 1942. Herbert McDowell, Referee. Helene McDowell, Clerk. [21]

[Title of District Court and Cause.]

OBJECTIONS OF BANK OF AMERICA N. T.
& S. A. TO PETITION FOR ORDER PER-
MITTING THE PAYMENT OF ATTOR-
NEYS' FEES TO FRED J. ROGERS,
FRANK CURRAN AND DAVID PECKIN-
PAH

To the Honorable Judges of the District Court of
the United States, Southern District, Northern
Division, and to the Honorable Herbert Mc-
Dowell, Conciliation Commissioner in and for
the County of Fresno:

Comes now Bank of America National Trust and
Savings Association, successor in interest and as-
signee of E. B. Campbell, and objects to the pay-
ment of the attorneys' fees prayed in that certain
Petition for Order Permitting the Payment of
Moneys for Attorneys' Fees filed herein on the 29th
day of June, 1942.

Said objection is based on the following facts
and circumstances, to-wit:

I.

Title to the Madera County real property upon
which the above named bankrupts predicate their
status as farmers has at all times since May 24,
1940 been claimed by Bank of America National
Trust and Savings Association, and the title to said
real property is at this time the subject of pending
litigation.

That should your petitioner, Bank of America National Trust and Savings Association, succeed in the said pending litigation, no part of the said real property, nor of the rents, issues and profits therefrom accruing since May 24, 1940, will constitute [22] an asset of the above named estate.

That the sole source from which the attorneys' fees prayed could be paid are the rents, issues and profits from the aforesaid Madera County real property, title to which is presently in dispute in the said pending litigation.

II.

The Petition for attorneys' fees prays for an exorbitant and excessive amount; that whereas, by law the debtors can never be allowed more than one reasonable attorneys' fee, the petition to which this objection is made prays for attorneys' fees for three attorneys.

III.

That no order authorizing the employment of any attorney named in the Petition for Attorneys' fees was ever made by the above entitled Court or Conciliation Commissioner, nor was any petition for such employment ever made to the above entitled Court or Conciliation Commissioner by the above named bankrupts, or either of them.

IV.

That recently heretofore and on or about February 25, 1942, an order was entered herein by Herbert McDowell, United States Conciliation Commissioner, directing the payment of Seven Hundred

Fifty Dollars (\$750.00) to Fred J. Rogers, Attorney for the bankrupts, from the funds of said bankrupts' estate, on account of alleged counsel fees for services theretofore and thereafter to be rendered in connection with the above named litigation instituted by your petitioner Bank of America National Trust and Savings Association by and against the said bankrupts, which order was not based upon a prior order authorizing the employment of the said Fred J. Rogers, as attorney for the bankrupts, nor upon any petition by the above named bankrupts, or either of them, for an [23] order authorizing such employment of the said Fred J. Rogers.

V.

That the value of the alleged services rendered the above entitled bankrupts cannot be determined until the outcome of the pending litigation concerning the said Madera County real property, and for this reason, it would be premature to make any present allowance of attorneys' fees.

Wherefore, your objecting Petitioner, Bank of America National Trust and Savings Association, prays that the Petition for Order Permitting the Payment of Moneys for Attorneys' Fees be denied, and that the Court Order and direct that Fred J. Rogers forthwith return to the above named estate any and all funds paid him from the assets

of the above named estate made under the authority of the aforesaid Order of February 25, 1942.

Respectfully submitted,

BANK OF AMERICA NATIONAL
TRUST AND SAVINGS
ASSOCIATION,

By WARNER EDMONDS

Vice President,

Petitioner.

EDMUND NELSON

DANIEL I. SCHNABEL

Attorneys for Petitioner. [24]

State of California,

County of Los Angeles—ss.

Warner Edmonds, being by me duly sworn, deposes and says: That he is an officer, to-wit: a Vice President of Bank of America National Trust and Savings Association, Petitioner in the foregoing Objections, and as such officer is duly authorized to make oath for and on behalf of said corporation; that he has read the foregoing Objections and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

WARNER EDMONDS

Subscribed and sworn to before me this 30th day of July, 1942.

CLARA KLEINMAN

Notary Public in and for said County and State.

[Endorsed]: Filed Aug. 3, 1942. Herbert McDowell, Referee. Herbert McDowell. [25]

[Title of District Court and Cause.]

ORDER PERMITTING THE PAYMENT OF
MONEYS ON ACCOUNT OF ATTORNEY
FEES

The petition of Miron Rustigian and Hagoohi Rustigian for approval of the payment of moneys on account of attorney fees, came on regularly for hearing on the 14th day of August, 1942, said petitioners appearing in court and by their attorney Fred J. Rogers; Bank of America, National Trust and Savings Association, appearing by its attorneys Daniel I. Schnabel, Lawrence W. Young and William B. Backlund; Security First National Bank of Los Angeles appearing by its attorney Claude L. Rowe.

Evidence both oral and documentary was offered and introduced, for and against said petition and the matter having been submitted for decision, and good cause appearing therefore.

It is hereby ordered, adjudged and decreed, that Fred J. Rogers, attorney for the petitioners be allowed and that there be paid to him by the within

debtors the sum of \$1500.00 on account of his attorney fees.

Dated: This 25th day of November, 1942.

HERBERT McDOWELL

Conciliation Commissioner.

[Endorsed]: Filed Nov. 25, 1942. Herbert McDowell, Referee. Helene McDowell, Clerk. [26]

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING NOTICE

State of California,
County of Fresno—ss.

Helene McDowell, being first duly sworn, deposes and says:

That she is a resident of the County of Fresno, State of California, Clerk of the above Court, and was not at any of the times herein mentioned, and is not now, interested in the foregoing matter.

That on the 6th day of July, 1942, affiant deposited in the United States Post Office, in the City of Fresno, a copy of: Notice of Special Meeting of Creditors in Proceedings Under Section 75-S of the Bankruptcy Act, and Notice on Petition for Order Permitting the Payment of Moneys for Attorneys' Fees in the matter of the said above named Debtors, a copy of which is hereto attached, inclosed in an envelope duly addressed to each of the Creditors named in the schedules filed by said Debtors, at

his place of residence or address as same is designated in said Petition, or as subsequently filed by the Creditor with the Referee; that said envelope bore the frank of Herbert McDowell, Conciliation Commissioner, as provided by law; that there is a regular communication by United States mail from said Post Office of deposit thereof as aforesaid, to each of said Creditor's place of residence.

HELENE McDOWELL

Subscribed and sworn to before me this 6th day of July, 1942.

[Seal]

HERBERT McDOWELL

Notary Public in and for said County and State.

[Endorsed]: Filed July 6, 1942. Herbert McDowell, Referee. Helene McDowell, Clerk. [27]

[Title of District Court and Cause.]

PETITION TO REVIEW ORDERS OF
CONCILIATION COMMISSIONER

Comes now your Petitioner, Bank of America National Trust and Savings Association, and respectfully shows:

I.

That Petitioner is a national banking association duly organized and existing under and by virtue of the laws of the United States.

II.

Petitioner claims all right, title and interest in and to the Madera County real property upon which

the above named debtors predicate their status as farmers, and the title to said real property at this time is the subject of the pending action to quiet title, in which action your petitioner is the plaintiff.

III.

Should your petitioner succeed in the said pending litigation, no part of the real property, nor of the rents, issues and profits therefrom accruing since May 24, 1940 will constitute assets of the above named bankruptcy estate.

IV.

That the sole source from which the above named debtors can pay attorneys fees are the rents, issues and profits from the aforesaid Madera County real property, title to which is presently in dispute in the said pending litigation. [28]

V.

That on or about February 25, 1942, an ex parte order was entered herein by the Honorable Herbert McDowell, United States Conciliation Commissioner, directing the payment of \$750.00 to Fred J. Rogers, an attorney purporting to represent these debtors, on account of alleged counsel fees for services therefore alleged to have been rendered in connection with the above mentioned litigation instituted by your petitioner, and attention is directed to the original of the said order on file herein, which is specifically referred to with like effect as though set out in full; and in this respect, your Petitioner does not know whether the said sum directed by

said order to be paid has or has not been disbursed to the said Fred J. Rogers. No notice of said order of February 25, 1942 was given petitioner within time to review the same, nor was any notice of said order ever given this petitioner at any time.

VI.

That on or about June 29, 1942 the above named debtors filed with the said Commissioner Herbert McDowell a petition for an order permitting the payment of attorneys fees to Fred J. Rogers, Frank Curran and David Peckinpah, which petition was regularly noticed and to which objections on the part of your petitioner were duly filed.

VII.

That the petition for an order permitting the payment of \$1,500.00 to the above named three attorneys was argued and submitted before the said Commissioner McDowell on August 14, 1942.

VIII.

That thereafter, and on or about November 25, 1942, the said Commissioner McDowell made and entered his certain order permitting the payment of moneys on account of attorney fees, and in this respect attention is directed to the original of said order on [29] file herein, which is specifically referred to with like effect as though set out in full.

IX.

That the order of February 25, 1942 is erroneous and illegal in the following respects and particulars:

1. That at a time when your petitioner's claim to the said Madera County real property and all rents, issues and profits therefrom was known to Commissioner McDowell and all parties in interest herein, an ex parte order directing payment of a portion of the disputed assets was made, and no opportunity was given petitioner to ascertain the nature of the alleged services, nor to object to the propriety of the order.

2. That at no time prior to the making of the order of February 25, 1942 were General Orders in Bankruptcy 42 and 44 observed nor was compliance at any time made with the said General Orders.

3. That the said amount of \$750.00 authorized to be paid as attorneys fees by said order of February 25, 1942 was excessive.

4. That the Conciliation Commissioner had no power to direct distribution of the disputed assets for any purpose whatever until title to the same had been determined.

5. That no findings of fact and conclusions of law were made in conjunction with or in support of the order of February 25, 1942, both of which are required by virtue of General Order 37, Rule 52-a of the Federal Rules of Civil Procedure, as stated in *Perry v. Baumann*, 122 F. (2d) 409.

X.

That the order of November 25, 1942 is erroneous and illegal in the following respects and particulars:

1. That said order purports to grant \$1,500.00 attorneys fees to Fred J. Rogers alone, whereas the

petition upon which this order is predicated nowhere prays such relief, but prays only for an order authorizing the debtors to pay from the disputed assets [30] “unto the said three counsel the sum of \$1,500.00”, and in this respect petitioner points out that no argument or evidence whatever was introduced at the hearing on the said petition of July 6, 1942 and petitioner’s objection thereto concerning the propriety of paying Fred J. Rogers alone the sum of \$1,500.00.

2. That at no time prior to November 25, 1942 were General Orders in Bankruptcy 42 and 44 observed, nor was compliance at any time made with the said General Orders.

3. That an allowance of the sum of \$1,500.00 to Fred J. Rogers is exorbitant and excessive, and in this respect petitioner points out that the said litigation to determine ownership of the said Madera County real property and all rents, issues and profits therefrom is still pending, the original trial in said litigation having been attended with such errors on the part of the said Fred J. Rogers and his purported associates as in the opinion of the trial court judge necessitated a new trial of the issue.

4. That the Conciliation Commissioner had no power to direct distribution of the disputed assets for any purpose whatever until title to the same had been determined.

5. That no findings of fact and conclusions of law were made in conjunction with or in support of the order of November 25, 1942, both of which are required by virtue of General Order 37, Rule 52-a

of the Federal Rules of Civil Procedure, as stated in *Perry v. Baumann*, 122 F. (2d) 409.

Wherefore, Petitioner feeling aggrieved by the provisions of said Orders of February 25, 1942 and November 25, 1942, and each of them, prays that each may be reviewed as provided by the Banruptcy Act, and amended, modified or set aside in all such respects as to the Court seems equitable.

Respectfully submitted,

BANK OF AMERICA NATION-
AL TRUST AND SAVINGS
ASSOCIATION,

By J. L. LATIMER

Vice President.

Petitioner.

EDMUND NELSON and
DANIEL I. SCHNABEL

Attorneys for Petitioner. [31]

State of California

County of Los Angeles—ss.

J. L. Latimer, being by me duly sworn, deposes and says: that he is an officer, to-wit: a Vice President of Bank of America National Trust and Savings Association, Petitioner in the foregoing proceedings, and as such officer is duly authorized to make oath for and on behalf of said corporation; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein

stated upon information and belief, and as to those matters he believes it to be true.

J. L. LATIMER

Subscribed and sworn to before me this 1st day of December, 1942.

CLARA KLEINMAN

Notary Public in and for said County and State.

[Endorsed]: Filed Dec. 3, 1942. Herbert McDowell, Referee. Helene McDowell, Clerk.

[Endorsed]: Filed April 20, 1943. Edmund L. Smith, Clerk, by R. B. Clifton, Deputy Clerk. [32]

TESTIMONY

Re: RUSTIGIAN CONCILIATION HEARING

[33]

MATT GOLDSTEIN:

Called as a witness on behalf of the Debtors, being first duly sworn, testified as follows:

Mr. Rogers: Q. What is your full name?

A. Matt Goldstein.

Mr. Schnabel: Is this gentleman a member of the bar? He has been sworn?

A. I have been sworn at.

Mr. Rogers: Mr. Goldstein, how long have you been practicing law? A. Since 1924.

Q. And where have you practiced?

A. I practiced 14 years in the City of New York and since October of 1938 in Fresno.

Q. And were you associated with Mr. Frank Curran prior to his death? A. I was.

(Testimony of Matt Goldstein.)

Q. And how long have you been associated with Mr. Curran?

A. Ever since I started practicing in Fresno.

Q. And do you know whether or not Mr. Curran had anything to do with the defense of this quiet title suit that we had in connection with the property in this case?

A. I do.

Q. What, if anything, do you know about his activities and work in connection with that defense?

A. Well, it was about a month before the trial that a large folder was brought to the office. I think I brought it. I think I called at Mr. Rogers' office and got it, and then Mr. Curran took that file and together we went over it at times, and there were other times when he worked on the case alone. I did not interview any of the witnesses, but I did confer with him, with Mr. Peckinpah and with Mr. Fred Rogers from time to time. We looked into the questions of law. There were some very, [34] very involved questions of law in the case, especially with reference to the type of evidence that might be admissible under the pleadings. We also prepared instructions for the Court. I know that Mr. Curran prepared a great many trial notes, and I think, although I can't say this positively, that they must have been based on interviews of witnesses, because there were a great many trial notes prepared by him.

Q. About how much time would you say Mr. Curran put on this matter prior to the trial?

A. Well, I know that he turned over practically

(Testimony of Matt Goldstein.)

all of the office work to me for two weeks before this case was tried and devoted his time almost exclusively to the preparation for trial of this case.

Q. And what was the nature of this trial, the litigation in question?

A. Well, I can merely state from the pleadings. I did not go to Madera. That time I was occupied in the trial of a case in the Superior Court of the County of Fresno. I know from the pleadings that it was based upon a claim of title by the plaintiff arising from the purchase through a sale under execution of this property which stood in the names of two of the defendants, I think it was Armon Rustigian——

Q. Myron and Hagoohi.

A. Myron and his wife. I know that, and that one of the defendants was Harry M. Rustigian, and the claim was made in the pleadings that Harry M. Rustigian was the true owner of the property and that Campbell had purchased his title at a sale under execution on a judgment of the Bank of America, so that therefore the action, if successful, would have completely defeated any interest of the [35] husband and wife in this property.

Q. Now, Mr. Goldstein, that trial commenced on May 27 of this year, did it?

A. That is right.

Q. And it was a jury trial?

A. That is correct.

Q. And how many days was consumed in that trial?

A. It was a three-day trial.

(Testimony of Matt Goldstein.)

Q. And how did the case terminate?

A. I understand there was a verdict on the part of the jury in favor of the defendants, husband and wife, the debtors. Also after that prepared findings of fact and conclusions of law. I prepared those with Mr. Curran.

Mr. Young: Go ahead and tell what happened afterwards.

Mr. Rogers: Don't bother: I am examining. You take him later on.

Q. Now, Mr. Goldstein, what, if any effect, did this verdict have on the ability of the debtors to gather the 1942 crop we referred to?

A. Well, if the plaintiff had been successful, of course, they would have had no title whatsoever, any interest in that property, and they would have had no right to gather any crops or to even live on the premises.

Q. And did you arrange with Mr. Curran to proceed with the appeal with myself?

A. That is correct.

Q. From the order granting the new trial?

A. That is correct.

Q. Now, in connection with that order for a new trial, in your opinion what do you feel the prospects are of reversing that order? [36]

(Objection. Objection overruled.)

A. Well, taking the statement for whatever it is worth, I appreciate the fact that any attorney on the losing side can be charged with bias with reference to his judgment of the correctness of the

(Testimony of Matt Goldstein.)

Court's judgment, but it seems to me that any evidence of fraud under those pleadings was utterly inadmissible under very well established cases, and it would also seem to me that the instruction which seemed to be the one attacked which is a restatement of the language of the Code of Civil Procedure and it seems to be the *principle* basis for the court's decision is entirely sound in an action to quiet title, and as a matter of fact, I think must be given. Failure to give it, I believe, would have been error. Now, that is the way I should say that the prospects of an appeal from this new trial order are certainly good, and might be regarded as excellent by an optimist.

Q. Now, Mr. Goldstein, do you know whether or not the debtors or anyone directly or indirectly paid anything for his services?

A. He has been paid nothing. I know that.

Q. Did Mr. Curran specialize in his legal work?

A. Yes. He specialized in trial work. He was primarily a trial lawyer.

Q. And particularly in jury trials?

A. He tried all types of cases, but he was especially successful in jury trials.

Q. Now, in your opinion, what would you say the reasonable value of the services rendered in this case were worth? [37]

A. Are you referring to all of the legal services or only the ones——

(Testimony of Matt Goldstein.)

Q. Well, Mr. Peckinpah, and, if you know, what I did, if anything?

A. Well, in view of the——

(Objection. Objection overruled.)

A. In my opinion the services were worth considerably in excess of \$1500. I take into consideration the difficulties of the case, the amount involved and the standing of the counsel who were in the case. Mr. Peckinpah and Mr. Curran and Mr. Rogers are all very well respected and well-known members of the bar. They are not beginners. They are well known members of the bar. In view of all of the difficulties involved, a fee of \$3000 would not have been excessive.

Q. Now, Mr. Goldstein, do you know anything about the quiet title suit as to the team work of the Bank of America and the Security Bank in attempting to win this case?

A. I know that these people, of course, were being crowded from both ends. The Security-First National Bank was crowding the foreclosure of its mortgage which it had upon the property executed by the husband and wife who were the debtors in this proceeding, and the Bank of America was crowding from the title end, endeavoring to destroy the title of the debtors who executed the mortgage to the Security First National Bank, so that the debtors were caught right squarely in the middle of it in an action where they had formidable antagonists, and they were being caught from both ends of the storm, so to speak. [38]

(Testimony of Matt Goldstein.)

Mr. Rogers: Take the witness.

Cross Examination

Mr. Rowe: Q. Did I understand you over the phone to state that in your opinion that you were going to testify that the services were worth \$1000 or \$1500? Have you changed your opinion?

A. I was speaking of Frank Curran's services standing alone. They were worth between one thousand and fifteen hundred, and that included my own. That is the work our office did.

Q. And your testimony now as to the \$1500, that includes all of the attorneys, is that it?

A. No. I said that in my opinion the attorneys all told would have been justified in asking \$3000, but as I understand they have only asked for \$1500 in this proceeding, but I think the reasonable value of their services was in excess of \$1500 in this case.

Q. That is for all of the attorneys?

A. Yes, that is correct.

Q. And for the complete litigation?

A. For what has been done up to the present time, that is right.

Mr. Young: Q. How much, Mr. Goldstein, are you to get out of this fee?

A. I don't know. I will have to take that up with the executor of Mr. Curran's estate.

Q. You are the attorney for the executor of Mr. Curran's estate?

A. Yes. At his request in his will.

(Testimony of Matt Goldstein.)

Q. You prepared the instructions in the case?

A. I did.

Q. And they were reversed, or rather a new trial was granted on some instruction that you prepared?

A. I am informed that that is one of the grounds. [39]

Q. You know that to be a fact?

A. I wasn't in court, but I am informed that is one of the grounds.

Q. And what benefits, if any, have these defendants received up to date from your services?

A. Well, if you ask it that way, I think I can explain it. If they had been unsuccessful and had lost the case, because they were defendants they couldn't get anything from either of the two banks. All that they could do would be to defend their title. Up to the present time they have not only defended their title successfully, but they have gotten a jury to hold that that title is not subject to attack by the Bank of America or its representative, Mr. Campbell, so they have protected their title up to the present time against a very powerful attack from a very large financial institution with the benefit of very able counsel. That is point one. In the second place, they have gotten a breather in the sense that they now will be able to harvest their crop and apply it toward the payments, at least, as far as any revenue, the net revenue is derived from that crop, apply it toward the payment of their legitimate bills, toward the pro-

(Testimony of Matt Goldstein.)

tection of the title of the property and also the maintenance and operation of the property, and until the bank succeeds in getting an affirmative judgment through Mr. Campbell against them, their title is good against the world, so they can continue to enjoy their property. To me that seems to be a very substantial benefit. They have a very sizable investment here. They have devoted a good many years to the improvement of this property, and [40] it would seem to me that is—well, the value can't be estimated because if they were unsuccessful, they wouldn't have anything, so to my mind if it hadn't been for their attorneys being successful in holding the banks back, they wouldn't have anything at all.

Mr. Young: Q. Well, Mr. Goldstein, you have discussed this matter with Mr. Curran?

A. A great many times.

Q. And he told you he had a contingent fee?

A. No, he did not. He never told me what his fee was.

Q. Did you ever ask him?

A. I know I spoke to Mr. Rogers about it.

Q. Did you ever ask Mr. Curran what his fee was?

A. No, I can't say. I just knew generally that a fee would have to be passed upon by the conciliator. I realized then they couldn't have any agreement for fees in this case, because all fees are subject to the approval of the court. I don't think I

(Testimony of Matt Goldstein.)

ever asked him, and I know I did not know what his fee was.

Q. You have known Mr. Curran how long?

A. For about four years.

Q. And you have been with him in the trial of cases at other times? A. Many times.

Q. And you know Mr. Curran was known around here as a lawyer of skill, but he was a lawyer who insisted upon his fees being fixed before he went into court?

A. Mr. Young, I can answer that by saying that you don't know anything about him, if you say that. [41]

Q. That isn't the information I have.

A. Because that man, he did more work for nothing than any lawyer in this court room, and I am not casting aspersions on anybody. He did more able work for more poor people for not a cent of compensation. You don't know about it, but I do. Incidentally, he used to make me help him out in those cases, so I know about it. Reputation and character are two different things.

Q. I want you to understand I am not throwing any aspersions on Mr. Curran.

A. I understand.

Mr. Rowe: Q. Mr. Goldstein, I understand a fee of either, somewhere between 1500 to \$3,000 for all of the attorneys for their work in this case to date would not be unreasonable, somewhere between 1500 and \$3,000?

A. I think that is fair. It is pretty hard to put a dollar and cent value on these things, but I

(Testimony of Matt Goldstein.)

think a fee of \$3,000 would not be in my judgment, would not be excessive and certainly \$1500 in my opinion is low, is decidedly low.

Q. But not unreasonable, you would say?

A. Well, I have said that 3,000 is reasonable.

Q. Yes. And \$1500 is not unreasonable, isn't that the way you stated?

A. I think it would be unreasonably low.

Q. You do? A. I do.

Mr. Rowe: That's all as far as I am concerned.

The Conciliator: Any other questions, gentlemen?

Mr. Rogers: No further questions.

Mr. Backlund: May I ask one question? [42]

(Objection.)

Mr. Young: Q. What agreement, if any, if you know was had with Mr. Dave Peckinpah as to his fee?

A. I know nothing about the arrangement. I didn't participate in it. I can't testify to it.

Mr. Young: That's all.

Mr. Rogers: All right. Mr. Peckinpah, will you come forward and be sworn, please?

DAVID E. PECKINPAH

called as a witness on behalf of the Debtors, being first duly sworn, testified as follows:

Mr. Rogers: Q. What is your full name?

A. David E. Peckinpah.

(Testimony of David E. Peckinpah.)

Q. And, Mr. Peckinpah, you are an attorney-at-law? A. I am.

Q. And how long have you been practicing?

A. I have been practicing since December of 1921 in Fresno, California.

Q. Continuously? A. Continuously.

Q. And what, if anything, did you have to do with the defense of this quiet title suit we have been talking about?

A. I participated in the trial and the preparation thereof for the trial.

Q. And that trial was before a jury, was it?

A. That trial was before a jury in the Superior Court of Madera.

Q. And how many days were consumed in the actual trial? [43]

A. Three days in the actual trial.

Q. And you were there all three days continuously?

A. I was there continuously all three days.

Q. And what, if any, time did you put in prior to the trial in preparation?

A. Well, altogether a little more than two days before it. I didn't intend to put any preparation in other than to have a conference with you and Mr. Curran, but certain events came up and I did do more preparing than I intended to.

Q. Now, what was the nature of the litigation as to the Security Bank, Security First National Bank of Los Angeles and Mr. Campbell joining together in the trial of the case?

(Testimony of David E. Peckinpah.)

A. Well, as I understood, the Security First National Bank held a mortgage against the property and had started foreclosure proceedings and then had gone before the Conciliation Commissioner. The Bank of America claimed that one Harry Rustigian owed them a lot of money, and he was related to the people that owned this 100 acres, and it seemed to be producing pretty well, and so they brought suit to declare him the owner of the land, and the litigation was on that basis. The Security First National Bank didn't appear with counsel or evidence other than to ably assist by testimony and opinions the Bank of America's contentions.

Q. Yes. Now, what was the result of that trial?

A. The result of the trial was a unanimous verdict.

Mr. Young: Ten to two, Mr. Peckinpah.

A. I understood it was a unanimous verdict for the defense. [44]

Mr. Backlund: The jury was polled.

A. Ten to two?

Mr. Backlund: Yes.

Mr. Rogers: Q. For the debtors in this case?

A. For the debtors in this case.

Q. And what, if any, practical results followed the trial after the motion for a new trial was granted?

A. Well, the results were that the defendant owners of the land were still in possession under

(Testimony of David E. Peckinpah.)

the supervision of the Conciliator, and can take the crops and apply them to the indebtedness and can continue to farm the property. Had the verdict been adverse, of course, that wouldn't have been possible.

Q. And as to the prospective outcome of an appeal?

A. Prospective outcome of an appeal, it is my considered opinion that the order of the Court granting a new trial ought to be promptly reversed. It was a mistake, and it is my opinion that it will be reversed, because the case was tried by able counsel for the plaintiff on a mistaken theory and against their pleadings. Their pleadings were erroneous on the theory that they tried the case, and the court erred in not sustaining the objections we made to their evidence, and that alone ought to set aside the order granting a new trial and probably will.

Q. Now, do you know about anything, as to what, if anything, I might have done in connection with this case and the preparation of it?

A. Yes, I do. As to the two days that [45] I spent before the trial, I know that you were working all of the time, and I know that before that in one or two discussions that I had with you and Mr. Curran you had spent several nights interviewing witnesses and in preparation of this case, and I know from the work that I did with you the two days immediately previous to the commencement

(Testimony of David E. Peckinpah.)

of this trial that you must have spent a great many days before that time in working up the evidence and the law in the case.

Q. Mr. Peckinpah, were you directly or indirectly paid any money for your services or efforts in this case?

A. I have not been paid anything yet.

Q. What, if any, arrangements were made with you to compensate you for your efforts?

A. Well, you came to my office several weeks after the case was set, and asked me if I would be willing to assist in the trial and do a part of the trial work in the case, and you asked me what my compensation—what I would desire for compensation, and I told you if I wasn't required to draw the instructions or prepare a trial brief and that my responsibility would be in the active examination of the witnesses only, that my charges would be \$150 first day, and \$100 a day thereafter. When the time came to actively get ready for the trial and when I felt it was necessary that I interview several of the witnesses and discuss many law points that came up in reference to the pleadings with you, I suggested that our arrangements would be unsatisfactory, because it was only based upon actual trial work, but that I would be willing to leave it up to you [46] to fix reasonable compensation for the time put in before the trial, and you said that you would do so, and it was left that way. There was no fixed sum. I might add that the

(Testimony of David E. Peckinpah.)

\$100 that you fixed was unsatisfactory to me, but I am willing to abide by it.

Q. You mean the \$100 for the additional time?

A. Yes. There were \$350 used up in the trial of the case, so the \$450 you asked for me, I assume that \$100 you have added for my time in preparation of the case. I thought it was too small, but I agreed to allow you to make the decision so I am not complaining about it.

Q. And, Mr. Peckinpah, what in your opinion would be a reasonable attorney fee to be allowed by the Court in the carrying on of the defense of the entire quiet title suit up to and including the trial?

A. Up to and including this trial. For how many attorney fees?

Q. Yourself and Mr. Curran and myself?

A. I think that the \$450 asked for me is very reasonable, almost to the point of being unreasonably low, considering the results of the case and the work and the responsibility, but that was fixed on a per diem basis, so I don't think I should complain about it. As far as the work Mr. Curran did who actively participated in the trial of the action and the work you did in the preparation of the case before the trial and during the trial, I would say that \$2500 would be a very reasonable fee for you.

Mr. Rogers: Take the witness. [47]

(Testimony of David E. Peckinpah.)

Cross-Examination

By Mr. Young:

Q. Mr. Peckinpah, let me ask you a couple of questions. You say that you spent days and nights interviewing witnesses.

A. I didn't say any such thing.

Q. You did say you spent one day and one night?

A. I didn't say any such thing.

Q. Did you interview any witnesses at all?

A. Yes.

Q. How long did it take?

A. How long did it take?

Q. Yes.

A. Oh, I would say it would take probably altogether in talking to witnesses, seven or eight hours.

Q. And how many witnesses did you interview?

A. Well, I would have to consult my books to tell you.

Q. Isn't it true that the only witnesses you interviewed were Myron Rustigian and his wife?

A. No. I am not going to tell you who I interviewed because I expect to be in the trial again.

Q. You will put them on the stand?

A. You are not going to find out about it.

Q. Not that I am interested in who they were, but I think we have a right to know how many?

A. I will give you an idea of how many.

Q. All right.

A. I interviewed to the best of my recollection, I think six. I am not sure about that.

(Testimony of David E. Peckinpah.)

Q. And as a matter of fact, the only witnesses you used at the time of the trial were Mr. and Mrs. Rustigian, the defendants, and Harry Rustigian? A. Uncle Harry.

Q. Uncle Harry and the defendants and a man by the name of [48] Kuya (?)?

A. I think that was all used. That is all we found necessary to use, Mr. Young, the way you tried the case.

Q. Well, now you had nothing at all to do with the erroneous preparation and making up of the instructions?

A. There was no erroneous preparation of the instructions. There was an erroneous ruling by the judge.

Q. I take it you are in a position to determine that over and above the judge?

A. I think I am. I think the appellate court will sustain me.

Mr. Young: I think that's all.

Mr. Rowe: Mr. Peckinpah, did you have any conversation with Mr. Curran about how much he was to receive or what would be the reasonable value of his services in this case?

A. No, I haven't. No, I haven't any idea of what his arrangements were and I didn't ask him.

Q. Did you have any conversation with Mr. Rogers in which any contingent fee in this case was mentioned by Mr. Rogers?

A. No. Mr. Rogers never told me anything about his personal arrangements or what arrange-

(Testimony of David E. Peckinpah.)

ments he made with Mr. Curran. He made a perfectly business-like arrangement with me and that's all I know about it. I haven't the slightest idea whether it is contingent or otherwise.

Q. Would you say to the court what in your opinion are the customary, reasonable trial charges of a good trial attorney like yourself before a jury, daily?

A. Well, it varies from one to one hundred fifty dollars a day with a retainer fee for the first day's trial for \$150 to \$250. I [49] might say that I fixed the first day at \$150, because Mr. Frank Curran was in the case and was a very prominent trial lawyer, and I felt that under the circumstances it would be easier work, and that it was proper to cut down the first day. Ordinarily the charge for the first day, the familiarizing yourself with the case, the first day's trial is \$250, and then depending on the type of case it is and whether you are before a jury or a court, the per diem runs from \$75 to \$150 ordinarily.

Q. What is the customary, reasonable charge for a first class attorney in the preparation of a jury trial such as this case, Campbell vs. Rustigan?

A. That depends entirely on the time taken, the difficulty in interviewing the witnesses. For instance, if you have to use an interpreter if it is hard to understand them, the distance you have to travel to investigate your case, and it can run from \$250 to \$300 to \$1,000. For instance, there was one case that I traveled all over the State of Cali-

(Testimony of David E. Peckinpah.)

fornia and part of Nevada. My charges were \$1500 for preparation alone on that case. That depends entirely on the time that is necessary to put in. There are some cases, take negligence cases, where you might only have to use a half a day to get all of the interviews that you need and to investigate the scene of the accident. There are other cases where it might take a day, two or three days or a week, depending on location and facts, so that that is a hard question to answer.

Q. Well, isn't it customary for a first class attorney in [50] Fresno to charge about \$50 a day for preparing a case?

A. Well, I wouldn't say. No customary charge for a first-class attorney. I would say that perhaps on the defense of negligence cases, it runs \$75 a day. Perhaps with insurance companies where they have lots of cases and they have an agreement, it would be \$50, but I don't think that under any circumstances a first-class attorney charges less than \$75 a day for the preparation of a case, and I say again that all depends on the case, the amount involved, the importance of it, and what you have to do.

Q. The trial of this particular case of Campbell vs. Rustigian lasted three days, did it not?

A. Three days.

Q. In the Superior Court in Madera County?

A. It was a difficult case to try.

Q. And Mr. Curran tried the case with the exception of a few questions asked the present con-

(Testimony of David E. Peckinpah.)

ciliation commissioner, Mr. McDowell, by Mr. Rogers, did you not?

A. Well, the bulk of the case was tried by Mr. Curran and myself. We examined practically all of the witnesses. Mr. Rogers handled, I think, two witnesses. No, I think he handled three. I am not sure about that, two or three.

Q. And you and Mr. Curran questioned the jury, did you not? A. Yes.

Q. Examined the jury?

A. We were in consultation with Mr. Rogers all the time.

Q. And you and Mr. Curran gave the opening and closing address to the jury?

A. That is right. [51]

Q. And Mr. Rogers?

A. You should have been there.

Q. Mr. Rogers didn't participate in that?

A. No.

Q. Did Mr. Curran do any more of the examination of witnesses or questioning of jurors than yourself?

A. No. I think probably about even. We took the jurors off and on alternatively and the witnesses just about the same way. I think Mr. Curran did more of the direct examination, and I did more of the cross-examination, if I remember it correctly.

Q. And that applies to the argument to the jury, too?

A. Well, Mr. Curran wasn't feeling very well

(Testimony of David E. Peckinpah.)

at the time so he opened and asked me to take the burden and most of the time on the closing argument.

Q. In your opinion, if there is one attorney trying a case like that, questioning the witnesses, the jurors and delivering the argument, would he not be entitled to a higher compensation than if there are two or three attorneys?

A. No, I don't think so, because if counsel who doesn't participate in the actual trial has done the required work in marshalling facts, getting them in order so that they are easily digested by the trial lawyer and has his law prepared in order to allow the trial lawyer to present the case in a sane and sensible way, his work is just as important in its way as the trial lawyer's work, and this case was big enough and important enough to merit the attention of three counsel, I am sure.

Q. In your opinion, does the fact that your client was a bankrupt, would that have any effect on the size of the fee [52] in this particular case or should it have any effect?

A. Yes, I think that has to be taken into consideration, and I assume that Mr. Rogers has taken that into consideration in asking for the low fee that has been asked for in this case. This case justified a much larger fee if the people weren't bankrupt. I don't think there is a counsel in this court room that would consider taking this case, the defense of this case for that kind of a fee under other circumstances.

(Testimony of David E. Peckinpah.)

Q. Would the fact that a new trial was granted tend to lessen the total value of the services of the three lawyers in your opinion in this case?

A. Well, I can't answer that until the time comes that we know what the ultimate outcome of the case is. At the present time, no, positively no. The results are still very beneficial for the defendants. In the end, possibly, but we haven't reached that, and that would only be an opinion. I don't think at the present time that the fees are based upon any ultimate outcome anyway.

Q. At the present time there is an appeal pending in the case of Campbell vs. Rustigian?

A. I understand there is. I am not sure. You will have to ask Mr. Rogers and Mr. Goldstein about that. I am not sure whether an appeal is pending or not.

Q. And in the event an appeal is denied, there will be another trial?

A. There will be another trial.

Q. And have you any estimate as to the reasonableness of fees for the present counsel for the defendants in the appellate courts? [53]

(Objection. Objection sustained.)

Mr. Rowe: That's all.

Mr. Rogers: We rest.

DAVID E. PECKINPAH

called as a witness and being heretofore duly sworn, testified further as follows:

Mr. Schnabel: You are already sworn, Mr. Peckinpah?

A. Yes.

Q. How many hours did you spend in the preparation of the work and presentation, how many hours altogether? A. In the trial, too?

Q. In the trial, too.

The Conciliator: If you want a piece of paper and time to figure it out——

Mr. Schnabel: Q. Didn't you keep an office hour record?

A. I could tell you approximately.

Q. A fair approximation is all right. Your professional statement of an approximation is good enough for me.

A. I'd say probably 40 hours.

Q. 40 hours. And that was office work including preparation, conferences, and examination of the law? A. Yes.

Q. Now, how many hours did you spend in court? A. I spent three days.

Q. Three days in court? A. Yes.

Q. Now, were your 40 hours included in your computation—now, were the three days included in your computation of 40 [54] hours or were they separate?

A. I didn't spend 35 hours in court. Actual hours from 10 to 12 and usually from 2 to 5. You

(Testimony of David E. Peckinpah.)

interview witnesses over time and during your recesses and so forth.

Q. Shall we say 15 hours in court?

A. Well, it would really be more. Fifteen hours of trial work, but, of course, you get there early and you talk to witnesses and you have conferences after hours with your associate counsel, but actual trial work fifteen hours, I would say, perhaps we had better make that about 18 hours. I think we went a little overtime on the last day.

Q. Eighteen hours and how many hours again in the office?

A. In the office, well, I'd have to look it up. I would have to guess now.

Q. What is your best approximation?

A. My best approximation would be 35 to 40 hours.

Q. Mr. Peckinpah, did you obtain an order from this court or from the United States District Court to do work for these bankrupts or for this bankruptcy estate?

Mr. Rogers: Just a minute. I object to that on the ground it is not the best evidence. If there is an order it is in writing, and that is the best evidence. As a matter of fact, we will stipulate there wasn't any order made.

Mr. Schnabel: I accept the stipulation.

Q. Did you prepare or have prepared in your office a petition for your employment to be signed by these bankrupts or either of them?

A. I didn't, no, sir. [55]

(Testimony of David E. Peckinpah.)

Mr. Schnabel: Mr. Rogers, will you stipulate with me that no order was obtained or filed on Mr. Peckinpah's behalf, on your behalf or on the behalf of Mr. Curran?

Mr. Rogers: There was no written order or petition made. There was a verbal discussion by the court is all.

Mr. Schnabel: Will you so stipulate?

Mr. Rogers: Yes.

Mr. Schnabel: I accept the stipulation.

Q. Now, Mr. Peckinpah, the trial was in Madera and, of course, you had to drive up there?

A. That is right.

Q. And you made two trips a day for three days? A. That is right.

Q. Did you have to do any other out-of-town investigation? A. On this case?

Q. Yes. A. No.

Q. And you have given us a substantial picture of the amount of work which you did in the trial and preparation of this case and in the investigation of the evidence which is that you spent approximately 15 hours in court, 15 to 18, and approximately 35 to 40 hours in the office?

A. Yes. That is just a guess. My office records will show the trial work by day, not by hours. The investigation will show by hours.

Q. This, however, is a fair approximation?

A. I think a fair approximation. I never count a trial day by the hour because sometimes you

(Testimony of David E. Peckinpah.)

start at 9.30 and end at 5. Sometimes you start at 10 and end at 4.

Q. Now, Mr. Peckinpah, keeping in mind that you are here [56] today to support the propriety and reasonableness for a petition for attorney fees, does this evidence just produced satisfy you as to the amount of work you did? A. Oh, yes.

Mr. Schnabel: Mr. Goldstein.

MATT GOLDSTEIN

called as a witness, and being heretofore duly sworn, testified further as follows:

Mr. Schnabel: Q. Mr. Goldstein, you were the office associate of Mr. Curran?

A. That is correct.

Q. Were you an employee or did you have a partnership or did you have what we call an office arrangement?

A. It was an office arrangement, an association.

Q. I see. Did you assist Mr. Curran in the preparation of this litigation for trial?

A. I did.

Q. I see you have no petition for attorney fee before the court at this time?

A. No, I have not asked for any, because Mr. Curran was the principal in this case, and merely asked me to do some of the work which he normally would have done.

(Testimony of Matt Goldstein.)

Q. You looked to him for your compensation?

A. To his estate.

Q. I see. Are you familiar with Mr. Curran's work in this case?

A. Well, I am familiar——

Q. Of your own knowledge, Mr. Goldstein?

A. Yes. A considerable part of it. [57]

Q. What part of it?

A. Well, he and I discussed the case together a number of times.

Q. Was that conversation or was it actual discussion, shall we say intellectual calisthenics with reference to trying the case?

A. It certainly had as its purpose the preparation of the successful trial of this case.

Q. Loose conversation, if I may put it that way.

A. It was a serious analysis of the pleadings and analysis of the law. I looked up a great many cases.

Q. Let me interrupt. Not what you did, since you look to Mr. Curran for compensation, but primarily what Mr. Curran did of your own knowledge.

A. I would look up cases and would digest what, in my opinion, was the law and then I would take it up and discuss it with him in order to fit the cases in the jigsaw puzzle.

Q. Did you do most of the work yourself?

A. As I say I would look up the law, and I

(Testimony of Matt Goldstein.)

would come into his office with my notes and we would discuss the law as applicable to the case.

Q. As you had discovered it?

A. As I had discovered it. And Mr. Curran asked me to prepare the instructions. I discussed those with him after they were prepared, so that when we worked, it was a joint venture so to speak. Both of us were working together in the preparation of this case.

Q. Do you know to whom Mr. Curran looked for compensation?

A. Yes, I do. He had his arrangement with Mr. Rogers.

Q. Do you know what that arrangement was of your own knowl- [58] edge?

A. I do not of my own knowledge.

Q. How many hours did Mr. Curran spend in the office in the preparation of this case of your own knowledge?

A. Well, for almost the better part of two weeks before the trial, Mr. Curran was busy with this file in this case. We had the file in our office during that time most of the time. There were times when we took it to Peckinpah, but primarily it was in Mr. Roger's office or our office.

Q. What were you doing for two weeks?

A. He was digesting the evidence. It was rather a massive file. He was conferring with Mr. Rogers regarding the witnesses. I know Mr. Peckinpah was there once or twice while I was there, and also we were giving a great deal of consideration to one

(Testimony of Matt Goldstein.)

—what we regarded as one very important question, that is how much evidence would be admissible on the state of these pleadings at the trial of this case. That occupied a great deal of our time, because we felt that the limitation of proof in view of the nature of the pleadings would be one of the principle issues that would have to be argued before the court.

Q. Now, to get back to this matter of hours, how many hours would you say?

A. I would say the better part of two weeks.

Q. The better part of two weeks. Five days a week or six days a week or seven?

A. Well, Mr. Curran almost lived at the office when he got ready to try a case.

Q. I see. Now, of this period spent in the office what [59] percentage would you compute to be your contribution?

A. I have never given that any thought.

Q. Did you work for two weeks, too, with him?

A. No. I was busy preparing another case for trial.

Q. But from time to time you would come in on the case when Mr. Curran wanted you to assist in the preparation of the law?

A. That is right.

Q. Mr. Curran of your own knowledge attended the trial for three days with these other gentlemen?

A. That is correct.

Mr. Schnabel: That's all. Thank you. Mr. Rogers.

FRED J. ROGERS,

called as a witness, and being first duly sworn, testified as follows:

Mr. Schnabel: Q. Mr. Rogers, I understand that you represent the bankrupt in this proceedings, is that correct? A. That's true.

Q. And you have before the court at this time a petition for attorney fees for three attorneys, yourself, Mr. Frank Curran and Mr. David Peckinpah, is that correct? A. True.

Q. And this petition is predicated upon alleged services granted the bankrupts, is that correct?

A. That is true.

Q. And their—— A. And their estate.

Q. And their estate. Do you intend to amend your petition to include alleged services to the estate or do you intend to rely upon it in its present status?

A. That remains to be seen. I am standing on it at the present time. [60]

Q. Thank you. Did you at any time obtain from the bankrupts or either of them a verified petition stating the name of the counsel whom they wished to employ, the necessity for the employment, the amount of time to be consumed in the anticipated employment and the nature of the professional services to be rendered?

A. Only the petition filed in this court, I would say about December '41.

Q. And will you show that to me in the court's record please?

(Discussion off the record.)

(Testimony of Fred J. Rogers.)

A. The 23rd of December, 1941, it was sworn to.

Mr. Schnabel: If the Court please, I don't believe it is material anyway.

The Conciliator: Just a minute. I would like to find it. It was filed on February the 7th, 1942. Would you like to look at it?

Mr. Schnabel: No, your Honor, I discovered it was filed after the institution of these proceedings.

Q. Now, Mr. Rogers, that's the petition which Mr. McDowell has just identified as having been filed?

A. I haven't seen it. You didn't show me.

Q. I assumed you knew about it. You prepared and filed it.

A. That is not the one I am referring to. Yes, it is, too.

Q. Now, Mr. Rogers, I understand then that the debtors did not at any time petition this court for an order authorizing the employment of you nor Mr. Peckinpah nor Mr. Curran, is [61] that right?

A. They didn't in writing, but they did verbally.

Q. Thank you. Now, did you present to the court a petition for an order authorizing the employment of you as an attorney for the bankruptcy estate or for the bankrupts or either of them?

A. With the exception of that one of February '42 and also explaining the matter verbally——

Q. Just a moment, please. This purports to be a petition for attorney fees, not appointment of an

(Testimony of Fred J. Rogers.)

attorney. Understand me, I am asking you if you obtained from this court an order for your employment as an attorney for these bankrupts or either of them? A. Yes, I did.

Q. Or for the bankruptcy estate?

A. Yes.

Q. Now, will you tell me the date of the order so I may look for it in the file?

A. I looked for it in vain the other day. The date, I am not sure. I take it when this petition we are referring to came up for hearing the Court made an order granting me that amount of money for past services up to that time, and approved my employment as an attorney in this case, and I got the money.

Q. I see. But outside of this order authorizing payment to you of the sum of \$750, there was no order authorizing the employment for which this was compensation, is that correct?

A. No written order.

Q. That's all. Now, for the purpose of identification, may we say that the petition for order of payment on account of counsel fees by within debtors is the petition you now refer [62] to?

A. That is the one on record.

The Conciliator: There is two on record.

A. The one I am referring to is the one filed in February of '42, is the one I am referring to.

The Conciliator: What is the date of the filing, Mr. Rowe? February the 7th, wasn't it?

Mr. Rowe: 7th.

(Testimony of Fred J. Rogers.)

The Conciliator: February the 7th, '42. That is the first petition again. That is right.

Mr. Schnabel: Q. Was there an order made and entered by this court for the employment of Mr. Peckinpah?

A. I believe there was a verbal order made.

Q. I won't ask if it was entered. And Mr. Curran? A. Same thing.

Q. Same thing. Now, what was the purport of that verbal order and when was it allegedly entered into?

A. Well, I would say 30 days before this trial, the superior court trial we referred to. I took it up with Mr. McDowell the matter of getting into the record their employment, their association in the trial of the case.

Q. And who was present at this conference?

A. Mr. McDowell and myself.

Q. Just the two of you? A. Yes.

Q. Was Mr. Young advised of this conference?

A. No. We didn't notify Mr. Young.

Q. Was Mr. Rowe notified of this conference?

A. Not to my knowledge. [63]

Q. You know at that time that they were attorneys for E. W. Campbell and the Security-First National Bank at that time?

A. I didn't know whether Mr. Young was.

Q. Was Mr. Backlund present? A. No.

Q. Was he notified of this conference?

A. Not to my knowledge.

Q. Or Mr. Barbour? A. No.

(Testimony of Fred J. Rogers.)

Q. Was any notice given to anybody about this conference concerning the purported oral order authorizing the employment?

A. Not that I know of.

Q. You would have given it normally if any had been given? A. Probably.

Q. As a matter of fact, it was an office conference, was it not?

A. No, I went down especially to see Mr. McDowell about the matter, the trial coming up. I made special arrangements with these men. I figured we were going to do a lot of work in the trial of it, and they relied upon my discussions and arrangement that they would be adequately compensated, and they went ahead and did their best.

Q. Now, for the purpose of the record, does the Court recall this conference and what orders, if any, were entered as its aftermath?

The Conciliator: Well, only to this extent that at that time I explained to Mr. Rogers that there would be only one attorney's fee paid, and this court wouldn't make any arrangements as to its amount, character or anything of that character, only that it would allow what was shown on a [64] petition as to knowledge exercised and responsibility assumed and work done.

Mr. Schnabel: In other words, the substance of the conversation was simply at an appropriate time the Court would take up the matter of the allowance of court fees and would allow what in his opinion was proper under the law?

(Testimony of Fred J. Rogers.)

The Conciliator: That is right.

Mr. Schnabel: And there was no order authorizing the employment of these men and guaranteeing to pay them any stipulated amount?

The Conciliator: That is correct.

A. Just a minute, if I may interrupt. It is my recollection that at that time I was advised and told that there would be no question if these men joined with me and went in on the case, that they would be taken care of either through me or separately or some way in the matter.

Mr. Schnabel: Excuse me. Now, I don't intend to institute any argument between the bench and the witness here, but I feel that for the purpose of clarity we should know whether or not any oral order was made employing these men and guaranteeing to pay them any amount. Now, the Court has answered to the best of its ability, and I feel that the record will amply show that.

The Conciliator: Well, Mr. Rogers did tell me who he was going to employ. As to the amount to be paid, there was no discussion. We didn't consider such discussion, but as to the gentlemen who were going to be employed, I assured him [65] that the check would have to be drawn in one—I didn't intend to break up any check.

Mr. Schnabel: I see.

The Conciliator: But I did tell him that also he was justified in going ahead and getting them to help him.

(Testimony of Fred J. Rogers.)

Mr. Rowe: May I ask that both the statement of Mr. Rogers and the conciliator with your approval be stricken on the ground that they are incompetent, irrelevant and immaterial. It was no legal proceeding of the court or of the conciliation commissioner and from the testimony there was no legal order made and what the conciliation commissioner might have stated to Mr. Rogers as to what the law was clearly would be irrelevant and incompetent at this hearing.

(Objection overruled.)

Mr. Schnabel: With the understanding, of course, that whatever the legal significance of those circumstances, it will be taken into consideration by the court as we develop the law on the point.

The Conciliator: All right.

Mr. Schnabel: Is that satisfactory to you, Mr. Rogers?

A. I will answer any questions. Are you addressing me as a witness or counsel?

Mr. Schnabel: You are back in your roll as counsel.

Mr. Rogers: I am not going to stipulate to anything at this time.

Mr. Schnabel: Q. Now, Mr. Rogers there have been certain funds from the proceeds of the crop on this land in dispute in the [66] quiet title action impounded in this court, is that true?

A. I haven't examined the court's record as to the impounding of money. I haven't had anything to do with the impounding of it. I couldn't say.

(Testimony of Fred J. Rogers.)

Q. Yes.

Mr. Schnabel: Off the record. Mr. McDowell, I would like to find out how much money there is on hand sometime during these proceedings and we would like to have it in the record, if we may do that.

The Conciliator: Oh, yes.

Mr. Schnabel: Fine. Thank you. And, Miss Aynesworth, I hope you won't let me overlook it before we get out of here.

The Conciliator: Fine.

Mr. Schnabel: Q. Now, Mr. Rogers, prior to the date of adjudication, in other words, the amendment of these proceedings, had you been employed by these debtors or either of them? A. I had.

Q. You had been. And for how long a period prior to that time?

A. Well, I was employed by them when I drew up their schedule and petition to come under the act.

Q. Yes. The original petition under 8 OR, isn't that correct? A. Yes.

Q. Now, even before the proceedings were instituted in this court, they came to you?

A. They naturally came before they were *sign*.

Q. Now, directing your attention to a period four months prior to the institution of the proceedings, and ask you to [67] tell me during that period of time what fees, if any, were paid you by the bankrupts or either of them? A. Not a cent.

Q. Now, I direct your attention to a period of

(Testimony of Fred J. Rogers.)

time existing between the original petition under section 75A to 475S, and ask you what fees were paid to you by the bankrupt or either of them during that period of time? A. None.

Q. Now, drawing your attention to the payment of \$750 made to you in February of this year from the assets of this bankruptcy estate—correct me, if that is not the right date.

A. Well, the record shows the date. I don't remember the date.

The Conciliator: The order was made on February the 26th, 1942.

Mr. Schnabel: And the disbursement was made some reasonable time after that?

The Conciliator: Oh, yes, sometime after that.

Mr. Schnabel: Calling your attention to that figure, have you received at any time from the bankrupts or either of them any sums other than the \$750?

A. No, I didn't receive the \$750 on the attorney fees either.

Q. That amount has not been paid you yet?

A. That represented \$250 they owed me for costs advanced.

Q. In other words, you are saying that \$750 was the amount you got, but \$250 of that sum were your out-of-pocket expenses on their behalf?

A. That is right.

Q. But you did receive \$500 of that net, free and clear as [68] fees? A. That is right.

Q. Now, do you of your own knowledge know

(Testimony of Fred J. Rogers.)

whether the bankrupts or either of them at any time have paid Mr. Peckinpah or Mr. Curran anything?

A. I know they have not.

Q. Did anybody on behalf of the bankrupts or either of them pay you anything?

A. Not that I know of, no.

Q. You would know, if they had?

A. Certainly would.

Q. And so no one has paid you anything with the exception of the \$750 allowed by this court sometime in February of this year in these bankruptcy proceedings?

A. That is right.

Q. And that is the only amount paid to any attorney in these bankruptcy proceedings?

A. As far as I know.

Q. Did Harry Rustigian pay you anything?

A. Nothing.

Q. Thank you. Now, Mr. Rogers, in fairness to you, I want to ask you how many hours you put in.

The Conciliator: There is one thing I would like to call your attention right here, that in all these petitions, I mean these petitions that the bank has filed, they use the phraseology, as I see it, that this \$750 was for future services. That isn't according to the order. The order was the proceedings in the sum of \$750—wait a minute.

A. Services heretofore rendered.

The Conciliator: In other words, the \$750 was for services heretofore rendered.

(Testimony of Fred J. Rogers.)

Mr. Rowe: But the petition asked for services to be rendered.

The Conciliator: That is right, and I didn't grant it.

Mr. Schnabel: And when you granted the petition, we assumed [69] that that had been for both.

The Conciliator: I wouldn't grant that. I only granted for services previously rendered.

Mr. Schnabel: In other words, the money the court granted was for what Mr. Rogers had done up to that time and for costs?

The Conciliator: In other words, I noticed that in both yours and Mr. Rowe's petition you used that phraseology. I wanted you to understand that the order was for services previously rendered and not for services to be rendered.

Mr. Schnabel: Q. Now, Mr. Rogers, how many hours did you put in representing the Rustigians in your office, investigation and in your trial time in the action E. B. Campbell vs. Myron and Hagoochi Rustigian in the Superior Court of Madera County?

A. Well, that would be hard to say in hours, but I can tell you in a general way what I did. I drew all of the pleadings in the case filed by the defendants or either of them. I interviewed all of their witnesses. I spent at least five nights before the trial from 7 o'clock until midnight at a certain place out here in Fresno interviewing the two debtors. One reason for that being that Myron Rustigian had a skull injury and his mentality was in-

(Testimony of Fred J. Rogers.)

jured, and it was very difficult to make him a witness, a understandable witness, and I spent a great deal of time with him, and I think I examined him in the trial as well as three or four other witnesses, and then they were in my office, of course, many times, and to say how many hours I [70] would hesitate to say, but I would say I put in at least ten days, that is, working days' time before the trial of that case.

Q. Now, did the ten days include the three days in trial?

A. Well, steady time I would think that probably ten days would cover all of my time if I did nothing else.

Q. One little matter I overlooked. Did you represent any member of the Rustigian family any time before the institution of these bankruptcy proceedings?

A. What do you mean by Rustigian family?

Q. I mean did you ever represent Harry Rustigian in any matter?

A. I had previously some years before, yes.

Q. I see. As a matter of fact, your representation was in the matter of buying this very property for him now in dispute in the Superior Court?

A. I never had anything to do with buying this property for Harry Rustigian.

Mr. Schnabel: Do you want to cross-examine, Mr. Rogers?

Mr. Rogers: I will waive that.

(Testimony of Fred J. Rogers.)

Mr. Schnabel: Mr. Peckinpah, do you want to ask your co-counsel anything?

Mr. Peckinpah: I will waive that.

[Endorsed]: Filed Dec. 17, 1942. Herbert McDowell, Referee, by Helene McDowell, Clerk.

[Endorsed]: Filed Apr. 20, 1943. Edmund L. Smith, Clerk, by R. B. Clifton, Deputy Clerk. [71]

[Title of District Court and Cause.]

NOTICE OF HEARING PETITION TO REVIEW
ORDERS OF CONCILIATION COM-
MISSIONER

To: Miron Rustigian and Hagoochi Rustigian, debtors above named, and to the Honorable Herbert McDowell, Conciliation Commissioner for Fresno County, and Messrs. Fred J. Rogers, Matt Goldstein, David E. Peckinpah and Claude L. Rowe, Attorneys at Law:

You and each of you will please take notice that on Saturday, June 5, 1943, at the hour of ten o'clock a. m., or as soon thereafter as counsel can be heard, in the Federal Building, Fresno, California, the Petition of Bank of America National Trust and Savings Association to review certain orders heretofore made in the above entitled proceedings by the Honorable Herbert McDowell, Conciliation Commissioner for Fresno County, will be

heard before the Honorable Leon R. Yankwich, Judge of the United States District Court for the Southern District of California.

Dated this 26th day of May, 1943.

EDMUND NELSON

DANIEL I. SCHNABEL

Attorneys for Bank of America National Trust and Savings Association. [72]

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING

State of California,
County of Los Angeles—ss.

F. R. Thayer, on oath says: I am a citizen of the United States and a resident of said County. I am over the age of eighteen years and not a party to the above entitled proceeding. My business address is 650 South Spring Street, Los Angeles, California. On the 26th day of May, 1943, I served the attached Notice of Hearing Petition to Review Orders of Conciliation Commissioner, on the debtors above named, on the Honorable Herbert McDowell, Conciliation Commissioner for Fresno County, and upon Attorneys Fred J. Rogers, Matt Goldstein, David E. Peckinpah and Claude L. Rowe, by putting a true copy thereof enclosed in each of six sealed envelopes, addressed as follows:

Miron Rustigian and Hagoohi Rustigian, care
Fred J. Rogers, Attorney at Law, Pacific
Southwest Bldg., Fresno, California;

Honorable Herbert McDowell, Conciliation
Commissioner, 516 Pacific-Southwest Bldg.,
Fresno, California;

Fred J. Rogers, Esq., Pacific Southwest
Bldg., Fresno, California,

Matt Goldstein, Esq., Brix Building, Fresno,
California,

David E. Peckinpah, Esq., Brix Bldg., Fresno,
California,

Claude L. Rowe, Esq., City Attorney, Pacific-
Southwest Bldg., Fresno, California,

and depositing said envelopes in the postoffice at
Los Angeles, California, with postage thereon fully
prepaid. There is regular [73] communication by
mail between the place of mailing and the places
so addressed.

F. R. THAYER

Subscribed and sworn to before me this 26th day
of May, 1943.

M. CUPP

Notary Public in and for said County and State.

[Endorsed]: Filed May 26, 1942. [74]

[Title of District Court and Cause.]

OPINION ON PETITION FOR REVIEW

Appearances:

For the Petitioner:

Daniel I. Schnabel,
Los Angeles, Calif.

For the Debtors:

Fred J. Rogers,
Matt Goldstein,
Fresno, California. [75]

Yankwich, District Judge:

On May 18, 1940, Miron Rustigian and Hagoohi Rustigian, his wife, debtors herein, filed their petition under Section 75 of the Bankruptcy Act of 1938, claiming to be farmers and listing as real property one hundred acres of farm land in Madera County, California. On August 23, 1940, they filed an amended petition under Section 75(s), and were adjudicated bankrupts. On July 21, 1941, E. B. Campbell petitioned this court for leave to institute action against the debtors and the bankrupt estate to quiet title to the farming property claimed by he debtors. Campbell based his claim upon an execution sale held on May 24, 1940, under a judgment obtained against one Harry Rustigian in the City and County of San Francisco. Permission to institute such action was granted on July 21, 1941, and the Conciliation Commissioner was directed to

appoint a trustee for the bankrupt estate to represent it and "accept service of pleadings" in the litigation. On November 10, 1941, the order was amended by eliminating from it the direction to the Conciliation Commissioner of Madera County to appoint a trustee. Campbell instituted action in the Superior Court of California, for Madera County to appoint a trustee. Campbell instituted action in the Superior Court of California, for Madera County, on November 27, 1941. After issue joined, the cause was tried before the court with a jury and on November 29, 1942, the jury rendered a verdict in favor of the debtors. Thereafter the court granted a new trial, from which order an appeal is pending. During the pendency of these proceedings, the Conciliation [76] Commissioner made two orders awarding Fred J. Rogers attorney's fees for services rendered as attorney for the debtor. The first order was dated February 25, 1942, and awarded him the sum of \$750.00 as attorney's fees, without notice to anyone. The second order was dated November 25, 1942. It was preceded by a petition which sought the sum of \$1500.00 for the services of Frank Curran, David Peckinpah and Fred J. Rogers in the defense of the state action. Objections to the petition were filed by the Security-First National Bank of Los Angeles as secured creditor and the Bank of America National Trust and Savings Association, successor in interest and assignee of E. B. Campbell. A hearing was had upon the petition and objections. On November 25, 1942, the Conciliation Commis-

sioner entered an order for the payment of the sum asked for to Fred J. Rogers alone, for \$1500.00. The money was paid to him on the same day. Up for review are the two orders, on the petition of the Bank of America National Trust and Savings Association, the other objector, the Security-First National Bank of Los Angeles, not having petitioned for review.

The debtors dispute the right of the petitioning bank to challenge the two orders. The bank was a claimant of the farming property of the debtor. Permission to institute action in the state courts to enforce its claim was granted by this court. He who claims the property of a debtor has a "controversy in bankruptcy". (Bankruptcy Act, Sec. 24; *Hewit v. Berlin Machinery Works*, 1904, 194 U. S. 296; *Gibbons v. Goldsmith*, 1915, 9 Cir., 222 Fed. 826) Consequently, although the [77] claim in this case was asserted in a state court, such claimant is adversely affected by an order allowing attorney's fees, which can only be paid from the income of the property which he claims.

The bank's review may, therefore, be entertained.

Coming now to the merits. The order of the Conciliation Commissioner entered on February 25, 1942, awarding Fred J. Rogers the sum of \$750.00 as attorney's fees, cannot be reviewed now. The order was made *ex parte*. And, while, as will appear further on, it was illegal, it cannot be challenged in the absence of a motion addressed to the Commissioner to vacate it. This seems to be the established rule in this and other circuits as to such

orders. (See 8 Remington on Bankruptcy, 5th Ed., Sec. 3703; *In re Snyder*, 9 Cir., 1925, 4 F(2) 627; *In re Retail Chemists Corp.*, 2 Cir., 1933, 66 F(2) 605, 607)

Considering the order of the Conciliation Commissioner dated November 25, 1942, and which allowed Fred J. Rogers, attorney for the bankrupt, the sum of \$1500.00 as attorney's fees, we must bear in mind the general rule that fees of attorneys for a debtor in bankruptcy are limited strictly to services rendered before bankruptcy in preparing the petition and schedules. Services rendered by such attorney after bankruptcy are compensable only in beneficial to the estate. I had occasion to treat this topic very fully in two opinions (See: *In re Owl Drug Co.*, D. C. Nev. 1936, 16 Fed Sup 139, 145, 146; *In re Charles Ray Glass*, D. C. Cal., 1942, 47 Fed Sup 428), so I will not repeat what is said there. The absence of findings of fact and conclusions [78] of law as to this order, which is apparent on the face of the certificate, makes it invalid. The order made upon notice and after the filing of a petition and objections and, after the taking of testimony,—was a trial “upon the facts”, which required findings of fact and conclusions of law. Without them the order cannot stand. (See Order 37, General Orders in Bankruptcy; Rule 52(a) of Federal Rules of Civil Procedure; *Perry v. Bauman*, 9 Cir., 1941, 122 F(2) 409; *Estate of Rendell*, 1932, 216 Cal. 384; *Diamond v. Grath*, 1941, 46 C. A. (2) 443, 447) However, assuming that this might be corrected, as suggested

by the debtor, by reversing the order and sending it back to the Conciliation Commissioner for further proceedings, such disposition of the matter would be helpful only if the order were otherwise valid. But the order is unquestionably invalid, and cannot be legalized by findings, as it was an allowance of attorney's fees made to the attorney employed by the debtor without an order of court authorizing such employment as required by General Order 44, which makes such order upon a verified petition, the condition precedent to the employment of attorneys for a debtor in possession. While the inclusion of attorneys for debtors in possession in this Order is new, the order is of long standing. And courts have held repeatedly that failure to comply with it renders the payment of attorney's fees invalid, even when the services have benefited the estate. (See: *Weil v. Neary*, 1929, 278 U. S. 160; *In re Eureka Upholstering Co.*, 2 Cir., 1931, 48 F(2) 95; *In re Rogers-Pyatt Shellac Co.* 2 Cir., 1931, 51 F(2) 988; *In re Progress Lektro Shave Corp.* 2 Cir., 1941, 117 F(2) 602; *Albers v. Dickinson*, 8 Cir., 1942, [79] 127 F(2) 957, 961) The attempt of the Conciliation Commissioner and the debtor to justify the allowance under Subdivision 1 of Section 64(a)(1) of the Bankruptcy Act of 1938, which gives priority to "the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition", finds no justification in the law. This subdivision was Section 64(1) of the old Bankruptcy Act. It has never been interpreted to apply to fees for

unauthorized attorneys of a debtor, employed in litigation to preserve the debtor's title to property in his possession, title to which he claims. All authorities agree that the clause refers simply to physical acts of preservation of the property by caretakers and others. (See: Gilbert's Collier on Bankruptcy, 4th Ed. Section 1304; 6 Remington on Bankruptcy, 4th Ed., Secs. 2634, 2635; and see *In re Mitchell*, 2 Cir., 1914, 212 Fed 932)

Hence the following ruling:

The Order of the Conciliation Commissioner, dated February 25, 1942, is affirmed.

The Order of the Conciliation Commissioner, dated November 25, 1942, is reversed, and the attorney for the debtor, Fred J. Rogers, is hereby ordered, within ten days from the date hereof, to repay to the estate the sum of \$1500.00.

Dated this 23rd day of July, 1943.

LEON R. YANKWICH,

United States District Judge.

[Endorsed]: Filed July 23, 1943. [80]

[Title of District Court and Cause.]

ORDER ON PETITION FOR REVIEW

The petition of the Bank of America National Trust & Savings Association to review the order of the Conciliation Commissioner dated February 25, 1942, allowing Fred J. Rogers, attorney for the debtor, the sum of \$750.00 attorney's fees and

the order of the Conciliation Commissioner dated November 25, 1942, allowing Fred J. Rogers, attorney for the debtor, the sum of \$1500.00 attorney's fees, heretofore argued and submitted, is now decided as follows on the grounds set forth in the opinion this day filed:

The order of the Conciliation Commissioner dated February 25, 1942 is affirmed.

The order of the Conciliation Commissioner dated November 25, 1942, is reversed, and the attorney for the debtor, Fred J. Rogers, is hereby ordered, within ten days from date hereof, to repay to the estate the sum of \$1500.00.

Dated this 23rd day of July, 1943.

LEON R. YANKWICH,

United States District Judge.

Opinion filed.

Judgment entered Jul. 23, 1943.

Docketed Jul. 24, 1943.

Book C O 1 Page 690.

EDMUND L. SMITH,

Clerk.

By MARIUS E. CROSS.

[Endorsed]: Filed Jul. 23, 1943. [81]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS

Notice is hereby given that Fred J. Rogers, attorney for the bankrupts in possession above-named,

and Miron Rustigian and Hagoohi Rustigian, the bankrupts above-named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from that part of the Order made by Honorable Leon R. Yankwich, United States District Judge, on the 23rd day of July, 1943, and filed and entered in the office of the Clerk of said court on the 23rd day of July, 1943, wherein said order reverses the order of the Conciliation Commissioner dated November 25th, 1942, and directs the said Fred J. Rogers, attorney for the bankrupts, within 10 days of the date thereof to repay to the estate the sum of \$1,500.00.

No appeal is taken from that portion of the order of Honorable Leon R. Yankwich which affirms the order of the Conciliation Commissioner dated February 25th, 1942.

Dated August 20, 1943.

MATT GOLDSTEIN,

Attorney for Appellants, 406
Brix Building, Fresno 1,
California.

[Endorsed]: Filed Aug. 21, 1943. [82]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know all men by these presents, That we, Fred J. Rogers, Miron Rustigian and Hagoohi Rustigian, as principals, and Associated Indemnity Cor-

poration, as surety, are held and firmly bound unto the above-named Bank of America National Trust and Savings Association in the sum of \$250.00, for the payment of which, well and truly to be made, we bind ourselves, our administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 20th day of August, 1943.

Whereas, a certain order was entered herein on the 23rd day of July, 1943, in a certain proceeding wherein Bank of America National Trust and Savings Association was petitioner and Fred J. Rogers, Miron Rustigian and Hagoohi Rustigian were respondents, and the said Fred J. Rogers, Miron Rustigian and Hagoohi Rustigian did, on the 20th day of August, 1943, file notice of appeal from said order as required by law, and

Whereas, a bond for costs on appeal in the sum of \$250.00 is required by law to be filed with said notice,

Now, therefore, the condition of this obligation is such that if the said Fred J. Rogers, Miron Rustigian and Hagoohi Rustigian shall pay all costs which may be ordered if the said appeal is dismissed or the said order affirmed insofar as said order is appealed from, and such costs as the Appellate Court [83] may award if the said order is modified, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

Signed, sealed and delivered in the presence of
FRED J. ROGERS,
MIRON RUSTIGIAN,
HAGOOHI RUSTIGIAN,
Principals.

[Seal] ASSOCIATED INDEMNITY
CORPORATION.

By BEN DRENTH,
Attorney in Fact, Surety.

State of California,
County of Fresno—ss.

On this 20th day of August in the year one thousand nine hundred and forty-three before me W. O. Watters, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Fred J. Rogers, Miron Rustigian and Hagoochi Rustigian, known to me to be the persons described in, whose names are subscribed to and who executed the within instrument, and acknowledged that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in said County, the day and year in this Certificate first above written.

[Seal] W. O. WATTERS,
Notary Public in and for said
County and State.

State of California,
County of Fresno—ss.

On this 20th day of August in the year one thousand nine hundred and forty-three before me, Mable Drenth, a Notary Public in and for said Fresno County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared Ben Drenth, known to me to be the Attorney in Fact of the

Associated Indemnity Corporation
the corporation described in and that executed the within and foregoing instrument, and known to me to be the person who executed the said instrument on behalf of the said corporation, and he duly acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office, in the said County of Fresno, the day and year in this certificate first above written.

[Seal] MABEL DRENTH,
Notary Public in and for the County of Fresno,
State of California.

My commission expires.....

[Endorsed]: Filed Aug. 21, 1943. [84]

[Title of District Court and Cause.]

NOTICE OF FILING OF NOTICE OF
APPEAL

To the Bank of America National Trust and Savings Association and to Daniel I. Schnabel and Edmund Nelson, Esqs., their attorneys:

Please take notice that on the 21 day of August, 1943, notice of appeal to the Circuit Court of Appeals for the Ninth Circuit and bond on appeal was filed by Fred J. Rogers, attorney for the bankrupts in possession, and Miron Rustigian and Hagoohi Rustigian, bankrupts in possession, from that part of a certain order entered on the 23rd day of July, 1943, in a certain proceeding wherein Bank of America National Trust and Savings Association was petitioner and Fred J. Rogers and Miron Rustigian and Hagoohi Rustigian were respondents, said appeal being taken only from said part of said order which reversed the order of the Conciliation Commissioner dated November 25th, 1942, and ordered Fred J. Rogers, attorney for the bankrupts in possession, within 10 days of the date of said order to repay the estate the sum of \$1,500.00.

Dated August 21, 1943.

EDMUND L. SMITH,

Clerk U. S. District Court,
Southern District of California.

By THEODORE HOCKE,

Deputy Clerk.

To: Daniel I. Schnabel and Edmund Nelson, Esqs.
Attorneys for Bank of America N. T. & S. A.

[85]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
RECORD ON APPEAL

Upon reading and filing the annexed Affidavit of Matt Goldstein, duly verified the 22nd day of September, 1943, and on motion of Matt Goldstein, Esq., attorney for the appellants,

It Is Hereby Ordered that the time to file the record and docket the appeal in the above-entitled matter be and it hereby is extended to and including the 30th day of October, 1943.

Dated: Los Angeles, California, September 23, 1943.

LEON R. YANKWICH,

United States District Judge.

[86]

[Title of District Court and Cause.]

AFFIDAVIT OF MATT GOLDSTEIN

Southern District of California,
State of California,
County of Fresno.—ss.

Matt Goldstein, being duly sworn, deposes and says:

That he is the attorney for the appellants in the within appeal; that the time for the filing of the record and docketing of the appeal in the Circuit Court of Appeal will expire on the 30th day of September, 1943.

That the designation of the portions of the record and proceedings to be contained in the record on appeal were served upon the attorneys for the respondents on September 15th, 1943, and the time of the respondents to serve and file a counter-designation will expire on the 28th day of September, 1945.

That in view of the fact that it will require some time after the 28th of September, 1943, for the Clerk to prepare the record on appeal, it is respectfully asked that the time within which the said record on appeal may be filed in the Circuit Court of Appeal and docketed in that court may be extended thirty (30) days from September 30th, 1943, to-wit, to the 30th day of October, 1943.

That no previous application for an extension of

time to file the record and docket the appeal has been made to any court or judge.

MATT GOLDSTEIN

Subscribed and sworn to before me this 22nd day of September, 1943.

[Seal] CHARLOTTE VIETTY

Notary Public in and for said County and State.

[Endorsed]: Filed Sept. 23, 1943. [87]

[Title of District Court and Cause.]

DESIGNATION OF THE PORTIONS OF THE
RECORD, PROCEEDINGS AND EVIDENCE
TO BE CONTAINED IN THE
RECORD ON APPEAL

Now comes Miron Rustigian and Hagoohi Rustigian, the bankrupts, appellants herein, and designate the portions of the record and proceedings and evidence to be contained in the record on appeal as follows:

1. Petition for review of order of referee, including exhibits as follows:

A. Petition of Miron Rustigian and Hagoohi Rustigian, verified by Hagoohi Rustigian, verified by Hagoohi Rustigian on June 24th, 1942, for payment of attorney's fees.

B. Objections filed by Security First National Bank of Los Angeles, verified July 16th, 1942.

C. Objections filed by Bank of America N. T. & S. A., verified July 30th, 1942.

D. Testimony of Matt Goldstein, David E. Peckinpah and Fred J. Rogers given before the Referee on July 29th, 1942.

E. Affidavit of mailing dated July 6th, 1942.

F. Order made by Herbert McDowell, dated November 25th, 1942.

G. Petition for review filed by Bank of America N. T. & S. A., December 3rd, 1942.

H. Referee's certificate on review.

2. Notice of hearing to review orders of Conciliation Commissioner dated May 26th, 1943.

3. Order made by Honorable Leon R. Yankwich, July 23rd, 1943, [88] reversing order of Referee dated November 25th, 1942.

4. Opinion of Honorable Leon R. Yankwich, dated July 23rd, 1943.

5. Notice of appeal.

6. Bond on appeal.

7. Debtors' petition under section 75, Bankruptcy Act, filed May 18th, 1940.

8. Approval of debtors' petition and order of Referee under section 75, Bankruptcy Act dated May 18th, 1940.

9. Debtors' amended petition for adjudication as bankrupts under section 75-s, Bankruptcy Act, filed on or about August 23rd, 1940.

10. Order of adjudication of said bankrupts under section 75-s, dated August 23rd, 1940.

11. Clerk's notice of filing of notice of appeal.

12. Designation of portions of record, proceed-

ings and evidence to be contained in record on appeal.

Dated: September 15th, 1943.

MATT GOLDSTEIN

Attorney for Appellants

406 Brix Building

Fresno 1, California

[Endorsed]: Filed Sept. 10, 1943. [89]

AFFIDAVIT OF SERVICE BY MAIL

[C. C. P. 1013A]

(Must be attached to original or a
true copy of paper served.)

No. 5465

State of California

County of Fresno—ss.

Ruhamah McKinsey, being sworn, says that she is a citizen of the United States, over 18 years of age, a resident of Fresno County, and not a party to the within action.

That affiant's (business) address is 406 Brix Building, Fresno, California

That affiant served a copy of the attached Designation of the Portions of the Record, Proceedings and Evidence to be Contained in the Record on Appeal by placing said copy in an envelope addressed to Edmund Nelson and Daniel I. Schnabel, Esqs. at his office address 650 South Spring Street Los Angeles 14, California which envelope was then sealed

and postage fully prepaid thereon, and thereafter was on September 15th, 1943, deposited in the United States mail at Fresno, California

That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

RUHAMAH McKINSEY

Subscribed and sworn to before me on September 15th, 1943

[Seal]

CHARLOTTE VIETTY

Notary Public in and for said county and state.

[Endorsed]: Filed Sept. 10, 1943.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 89 inclusive contain full, true and correct copies of: Debtor's Petition in Proceedings under Section 75 of the Bankruptcy Act; Approval of Debtor's Petition and Order of Reference; Debtor's Amended Petition in Proceedings under Section 75 of the Bankruptcy Act; Adjudication, Order of Reference and Temporary Restraining Order; Referee's Certificate on Review; Petition for Order Permitting the Payment of Moneys for Attorneys' Fees; Objections of Security-First National Bank of Los Angeles, Secured

Creditor, to Petition for Order Permitting the Payment of Monies for Attorneys' Fees; Objections of Bank of America N. T. & S. A. to Petition for Order Permitting the Payment of Attorneys' Fees to Fred J. Rogers, Frank Curran and David Peckinpah; Order Permitting the Payment of Moneys on Account of Attorney Fees; Affidavit of Mailing Notice; Petition to Review Orders of Conciliation Commissioner; Reporter's Transcript of Rustigian Conciliation Hearing; Notice of Hearing Petition to Review Orders of Conciliation Commissioner; Opinion on Petition for Review; Order on Petition for Review; Notice of Appeal to Circuit Court of Appeals; Bond for Costs on Appeal; Notice of Filing of Notice of Appeal; Affidavit and Order Extending Time to File the Record and Docket the Appeal; and Designation of the Portions of the Record, Proceedings and Evidence to be Contained in the Record on Appeal which constitute the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$34.25 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 27 day of October, 1943.

[Seal]

EDMUND L. SMITH, Clerk

By Theodore Hocke

Deputy Clerk

[Endorsed]: No. 10597. United States Circuit Court of Appeals for the Ninth Circuit. Fred J. Rogers, Miron Rustigian and Hagoochi Rustigian, Appellants, vs. Bank of America National Trust and Savings Association, a Corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Northern Division.

Filed October 28, 1943,

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Judicial Circuit

No. 10,597

(On Appeal from Order of District Court, Southern District, Northern Division, No. 5465, In Bankruptcy, entitled "In the Matter of Miron Rustigian and Hagoohi Rustigian, Husband and Wife, Debtors and Bankrupts".)

MIRON RUSTIGIAN and HAGOOHI RUSTIGIAN, Debtors and Bankrupts, and FRED J. ROGERS,

Appellants,

vs.

BANK OF AMERICA NATIONAL TRUST &
SAVINGS ASSOCIATION,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY ON APPEAL, AND DESIGNATION OF PARTS OF RECORD TO BE INCLUDED IN RECORD ON APPEAL

Now Come Miron Rustigian and Hagoohi Rustigian, Debtors and Bankrupts and two of the appellants herein, and Fred J. Rogers, attorney for the debtors and bankrupts and an appellant herein, and state that their appeal is from that portion of the Order made by Honorable Leon R. Yankwich, United States District Judge, on July 23rd, 1943,

and filed and entered in the office of the Clerk of said Court on the 23rd day of July, 1943, wherein said Order reverses the Order made by Herbert S. McDowell, Conciliation Commissioner and Referee, dated November 25th, 1942, and directs the said appellant Fred J. Rogers, within ten days from the date of said Order to repay to the Estate the sum of \$1500.00; and that appellants will rely on their appeal herein on the following points:

I.

That the United States District Court, Southern District, Northern Division, erred in finding that the Appellee, Bank of America National Trust & Savings Association, was a real party in interest in this bankruptcy proceeding and was an aggrieved party and had the right to petition for the review of the order made by the Conciliation Commissioner and Referee on the 25th day of November, 1942, awarding the sum of \$1500.00 as counsel fees to the appellant Fred J. Rogers.

II.

That the said United States District Court erred in disturbing the exercise by the Conciliation Commissioner and Referee of the discretion invested in him by the provisions of section 75 (b) of the Bankruptcy Act permitting the said Referee, in the interests of justice, to waive compliance by the appellants with the provisions of the Supreme Court General Orders in Bankruptcy, and particularly General Order 44 thereof.

III.

That the said United States District Court erred in refusing to exercise the discretion vested in said Court by the provisions of section 75 (b) of the Bankruptcy Act, in the interests of justice, to waive compliance by the appellants with the provisions of General Order 44 of the Supreme Court General Orders in Bankruptcy.

IV.

That the said United States District Court erred in finding that General Order 44 of the General Orders in Bankruptcy applied to the within proceeding and that the appellants were required to comply with the provisions of said General Order 44 as a condition precedent to the payment of attorney's fees for services rendered in said proceeding and in the protection of the property of the bankrupts over which the said Bankruptcy court had exclusive jurisdiction.

V.

That the said United States District Court erred in finding that the appellants were required to comply with General Order 44 of the Orders in Bankruptcy as a condition precedent to the payment of counsel fees to the appellant Fred J. Rogers for services rendered by the said Fred J. Rogers and other attorneys retained by him in protecting the property of the debtors and bankrupts.

VI.

That the said United States District Court erred in refusing to remand this matter to the Conciliation Commissioner and Referee for further proceedings in order to permit the said Conciliation Commissioner and Referee to make Findings of Fact and Conclusions of Law to support his Order dated November 25th, 1942, awarding the said appellant Fred J. Rogers the sum of \$1500.00 as counsel fees.

VII.

Appellants hereby designate to be included in and to constitute the record on appeal in said cause all the pleadings, petitions, papers, orders and documents referred to in that certain "Designation of the Portions of the Record, Proceedings and Evidence to be Contained in the Record on Appeal", bearing date the 15th day of September, 1943, heretofore filed by appellants in the District Court of the United States, Southern District of California, Northern Division, in the proceedings entitled "In the Matter of Miron Rustigian and Hagoohi Rustigian, Bankrupts, No. 5465, In Bankruptcy".

Dated: November 1st, 1943.

MATT GOLDSTEIN

406 Brix Building

Fresno 1, California

Attorney for Appellants

AFFIDAVIT OF SERVICE BY MAIL

[C. C. P. 1013A]

(Must be attached to original or a true
copy of paper served.)

No. 10597

State of California

County of Fresno—ss.

Ruhamah McKinsey, being sworn, says that she is a citizen of the United States, over 18 years of age, a resident of Fresno County, and not a party to the within action.

That affiant's (business) address is 406 Brix Building, Fresno, California

That affiant served a copy of the attached Statement of Points on which Appellants Intend to Rely on Appeal, and Designation of Parts of Record to be Included in Record on Appeal by placing said copy in an envelope addressed to Edmund Nelson and Daniel I. Schnabel, Esqs. at his office address 650 South Spring Street Los Angeles 14, California which envelope was then sealed and postage fully prepaid thereon, and thereafter was on November 5th, 1943, deposited in the United States mail at Fresno, California

That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

RUHAMAH McKINSEY

Subscribed and sworn to before me on November 5th, 1943.

[Seal]

CHARLOTTE VIETTY

Notary Public in and for said county and state.

[Endorsed]: Filed Nov. 8, 1943. Paul P. O'Brien, Clerk.